(12)

No. 93-986-CSX
Status: GRANTED

Title: Joseph McIntyre, Executor of Estate of Margaret McIntyre, deceased, Petitioner
v.
Ohio Elections Commission

Docketed:
December 16, 1993

Court: Supreme Court of Ohio

Counsel for petitioner: Goldberger,David

Counsel for respondent: Sutter,Andrew I.

Ptn mailed Dec. 16; recd Dec. 22, 1993.

Entry	Date	Note	Proceedings and Orders
1	Dec 16 1993	G	Petition for writ of certiorari filed.
2	Jan 20 1994		Brief of respondent Ohio Elections Commission in opposition filed.
3	Jan 26 1994		DISTRIBUTED. February 18, 1994 (Page 26)
4	Feb 22 1994		Petition GRANTED.
			**********
6	Mar 7 1994		Order extending time to file brief of petitioner on the merits until April 18, 1994.
7	Apr 18 1994		Brief amicus curiae of California Political Attorneys Association filed.
8	Apr 18 1994		LODGING consisting of nine copies of one document including the decisions of California Fair Political Practices Commission received from amicus curiae California Political Attorneys.
9	Apr 18 1994		Joint appendix filed.
10	Apr 18 1994		Brief of petitioner Margaret McIntyre filed.
12	May 5 1994		Order extending time to file brief of respondent on the merits until June 3, 1994.
13	May 18 1994	D	Motion of respondent to dismiss filed.
14	Jun 2 1994		Opposition of petitioner to motion of respondent filed.
20	Jun 2 1994		Motion to substitute executor Joseph McIntyre as the proper party petitioner FILED
15	Jun 3 1994		Opposition of respondent to petitioner's motion to substitute parties filed.
16	Jun 6 1994		DISTRIBUTED. June 10, 1994 (Page 17)
17	Jun 6 1994		Reply of petitioner to respondent's memorandum in opposition to the motion to substitute executor Joseph McIntyre as the proper party filed DISTRIBUTED.
18	Jun 13 1994		Motion of respondent to dismiss DENIED. The motion to substitute Joseph McIntyre, executor, in place of Margaret McIntyre, deceased, as petitioner in this case is GRANTED.
19	Jun 13 1994		Order further extending time to file brief of respondent on the merits until July 1, 1994.
21	Jun 16 1994	G	Application (A93-1090) for extension of time to file reply brief on the merits, submitted to Justice Stevens.
22	Jun 29 1994		Application (A93-1090) granted by Justice Stevens extending the time to file until August 31, 1994.
23	Jun 29 1994		Brief amici curiae of Tennessee, et al. filed.
24	Jul 1 1994		Brief amici curiae of Council of State Governments, et al.

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No. 93-986-CSX

Entry	Date	Note	Proceedings and Orders
			filed.
25	Jul 1 1994		Brief of respondent Ohio Elections Commission filed.
27	Jul 12 1994		CIRCULATED.
28	Jul 20 1994		SET FOR ARGUMENT WEDNESDAY, OCTOBER 12, 1994.(2ND CASE).
30	Aug 5 1994		Record filed.
		*	Original record proceedings Franklin County Court of Apeals.
29	Aug 8 1994		Record filed.
		*	Certified record proceedings Supreme Court of Ohio.
31	Aug 26 1994	X	Reply brief of petitioner filed.

Granted 2/22/94

93-986

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

MARGARET McINTYRE,

Petitioner,

v.

OHIO ELECTIONS COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court below err in upholding an Ohio statute that imposes a flat ban on distribution of anonymous political campaign leaflets?

2. Even if facially valid, can Ohio's statute banning anonymous political campign literature be applied to punish petitioner's distribution of political leaflets advocating defeat of a nonpartisan referendum on school taxes without violating the First Amendment?

LIST OF PARTIES

The two parties to the proceedings and in this Court are Petitioner Margaret McIntyre, the defendant-appellant below, and Respondent Ohio Elections Commission, the enforcement agency and appellee below.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

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Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

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Petitioner Margaret McIntyre respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio entered in the above entitled case on September 22, 1993.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio, review of which is sought by this petition, is reported as *McIntyre* v. *Ohio Elections Commission*, 67 Ohio St.3d 391, (1993). It is reprinted in the appendix of this petition at page A-1. The finding of the Ohio Elections Commission is represented in the appendix at page A-40. The opinions of the Franklin County Court of Common Pleas and the Court of Appeals of Ohio for

the Tenth Appellate District are unpublished and are reprinted in the appendix at pages A-16 and A-33 respectively.

JURISDICTION

On March 30, 1989, Petitioner Margaret McIntyre was charged with violating Ohio Revised Code § 3599.09 which prohibits the distribution of campaign leaflets that do not contain the name of the person who prepares and distributes them. On March 30, 1990, the Ohio Elections Commission issued its decision finding that petitioner violated R.C. § 3599.09 and fined her $100. On April 6, 1990, petitioner appealed this case to the Franklin County Court of Common Pleas. On October 2, 1990, the Court of Common Pleas reversed the decision of the Ohio Elections Commission and held that § 3599.09 was unconstitutional as applied to the petitioner. On April 7, 1992, the Court of Appeals of Ohio for the Tenth Appellate District reversed the Court of Common Pleas. On September 22, 1993, the Ohio Supreme Court affirmed the appellate court and held that § 3599.09 is constitutional on its face and as applied to the facts of this case.

The jurisdiction of this Court to review the September 22, 1993 judgment of the Ohio Supreme Court is invoked under 28 U.S.C. 1257(a).

THE CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE STATUTORY PROVISION AT ISSUE

Ohio Revised Code § 3599.09

> (A) No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other non-periodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefore. . . . This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution.[1]

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[1] The full text of this provision appears in the appendix at page A-36.

STATEMENT OF THE CASE

On March 30, 1990, the Ohio Elections Commission found Petitioner Margaret McIntyre guilty of violating R.C. § 3599.09 for distributing leaflets that she had prepared to oppose passage of a local ballot issue. The Commission imposed a $100 fine because the leaflets did not include her name and address. 67 Ohio St. 3d at 392[2]

The sequence of events leading to the fine began at the Blendon Middle School in Westerville, Ohio on the evening of April 27, 1988. *Id.* at 391. There, Ms. McIntyre, her son, and his girlfriend distributed leaflets opposing passage of the tax levy that was to be voted on in a referendum during the following week. *Id.* Petitioner was leafletting that evening because the Blendon Middle School was the site of a regularly scheduled school meeting at which the Westerville Superintendent of Schools was to be addressing the merits of the tax levy. *Id.* During the meeting, the superintendent made specific reference to statements contained in McIntyre's leaflet. St. Ct. Rec. 10.

Ms. McIntyre distributed her leaflets by standing in the doorway of the meeting room at the middle school and handing her leaflets to persons who entered. St. Ct. Rec. 10. Her son and his girlfriend distributed the leaflets in the school parking lot by placing them under automobile windshield wipers. *Id.*

The leaflets that were being distributed stated:[3]

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[2] All record references are either to the Ohio Supreme Court opinion below or to the document entitled "Record of Appellant" filed by Petitioner in the Ohio Supreme Court and referred to here as "St. Ct. Rec."

[3] The printed text of the leaflets is quoted accurately, however, due to different typeface and space limitations the format is not the same as the original leaflets. Reproductions of the original leaflets appear at pages A-38 and A-39 of the appendix.

VOTE NO

ISSUE 19 SCHOOL TAX LEVY

Last election Westerville Schools, asked us to vote yes for new buildings and expansions programs. We gave them what they asked. We knew there was crowded conditions and new growth in the district.

Now we find out there is a 4 million dollar deficit — WHY?

We are told the 3 middle schools must be split because of over-crowding, and yet we are told 3 schools are being closed — WHY?

A magnet school is not a full operating school, but a specials school.

Residents were asked to work on a 20 member commission to help formulate the new boundaries For 4 weeks they worked long and hard and came up with a very workable plan. Their plan was totally disregarded — WHY?

WASTE of tax payers dollars must be stopped. Our children's education and welfare must come first. WASTE CAN NO LONGER BE TOLERATED.

PLEASE VOTE NO

ISSUE 19

THANK YOU

CONCERNED PARENTS
AND
TAX PAYERS

J. Michael Hayfield, Assistant Superintendent of Elementary Education for the Westerville schools, saw Ms. McIntyre distributing the leaflets. He examined them and informed her

that her leaflets violated Ohio election laws because they did not contain her name and address. 67 Ohio St. 3d at 392.

On the next evening, April 28, 1988, a similar school meeting was held at the Walnut Springs Middle School. Petitioner again distributed leaflets opposing passage of the school tax levy to persons attending the meeting, *Id.*, and Assistant Superintendent Hayfield again informed her that her leaflets did not conform to campaign regulations because they did not contain her name and address. St. Ct. Rec. 10, 25.

Following her leafletting on April 27, 1988 and April 28, 1988, the school tax levy was defeated. It was also defeated in the next election. Finally, on the third try, it passed. 67 Ohio St. 3d at 398. Then, on April 6, 1989, after the tax increase was approved and almost one year after she had distributed her leaflets at the Westerville middle schools, she received a letter from the Ohio Elections Commission informing her that a complaint had been filed. St. Ct. Rec. 6. The complaint, filed by Assistant Superintendent Hayfield, charged her with violating R.C. § 3599.09 and two other statutes because she had distributed her leaflets at the middle schools without including her name.[4] St. Ct. Rec. 1.

Initially, the charges were dismissed for want of prosecution. St. Ct. Rec. 15. A short time later, however, they were reinstated at the request of Assistant Superintendent Hayfield. A hearing on the charges against petitioner was held on March 19, 1990. 67 Ohio St.3d at 392. At that time, petitioner appeared before the Ohio Elections Commission *pro se*. The Ohio Elections Commission found her to have violated R.C. § 3599.09 and dismissed the other charges. It imposed a fine of $100. *Id.*

On September 10, 1990, the Franklin County Court of Common Pleas reversed the finding of violation and the fine

[4] Ohio Revised Code §§ 3517.10(D) (failure to file a designation of treasurer) and 3517.13(E) (failure to file PAC report). Charges for violating these provisions were subsequently dismissed.

on grounds that § 3599.09 was unconstitutional as applied. App. A-33. On April 7, 1992, the Ohio Court of Appeals reversed, reinstating the finding of violation and the fine. App. A-16. On September 22, 1993, the Ohio Supreme Court affirmed, with Justice Craig Wright dissenting. App. A-1.

REASONS FOR GRANTING THIS PETITION FOR CERTIORARI

The Ohio Supreme Court has erroneously upheld a statute flatly prohibiting the distribution of all anonymous political leaflets. It has approved the imposition of a permanent, unconstitutional burden on political speech that is at the core of the electoral process. *Buckley* v. *Valeo*, 424 U.S. 1, 14-15 (1976). In reaching its conclusion, the Ohio Supreme Court has rejected this Court's teaching in *Talley* v. *California*, 362 U.S. 60 (1960) that, "[a]nonymous pamphlets, leaflets, brochures, and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." 362 U.S. at 64. Thus, the decision below raises extremely important First Amendment issues. It also contradicts the comparatively recent rulings of other courts.[5] As a consequence, this petition should be granted or, alternatively, the decision below should be summarily reversed.

I. Ohio Revised Code section 3599.09 imposes a flat ban on distribution of anonymous political campaign leaflets. Such a ban is explicitly prohibited by the First Amendment and by this Court's decision in *Talley v. California.*

a. The statute is overbroad because it prohibits distribution of all anonymous political campaign leaflets.

The Ohio Elections Commission fined Petitioner McIntyre because she prepared and distributed anonymous political leaflets stating her opposition to passage of a school tax referendum. Thus, she is being punished for the communication of a classic, political viewpoint.

[5] The opinions are cited *infra* at page 20.

Indeed, Ohio's statute prohibiting distribution of anonymous communications covers virtually every form of written communication without regard to whether the communication is truthful or whether it inflicts any harm on the election process. The statute is therefore prohibited by *Talley* v. *California*, 362 U.S. 60 (1960), which holds that distribution of anonymous political leaflets is protected by the First Amendment. As this Court stated in *Talley*, the prohibition of such leafletting is unconstitutional because it "would tend to restrict freedom to distribute information and thereby freedom of expression." 362 U.S. at 64.

The defendant in *Talley* was arrested because he distributed an anonymous handbill urging a boycott of certain merchants who sold goods manufactured by companies that engaged in employment discrimination. The distributor was tried in the Los Angeles Municipal Court for violating an ordinance that prohibited the distribution of "any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of . . . (a) [t]he person who printed, wrote compiled or manufactured [it] . . . [and] (b) [t]he person who caused the [handbill] to be distributed." 362 U.S. at 60-61. The municipal court held that the failure of the leaflet to include the name of the distributor violated the ordinance. It then found the defendant guilty and fined him $10.

This Court reversed the conviction on grounds that the sweeping identification requirement imposed by Los Angeles placed an impermissible restriction on constitutionally protected political speech. According to the Court, leafletting is a time-honored mode of political advocacy.

Thus it stated:

> In *Lovell* v. *Griffin*, 303 U.S. 444 [(1938)], we held void on its face an ordinance that comprehensively forbade any distribution of literature at any time or place in Griffin, Georgia, without a license. Pamphlets and leaflets, it was pointed out, "have been

> historic weapons in the defense of liberty" and enforcement of the Griffin ordinance "would restore the system of license and censorship in its baldest form." *Id.* at 452.

362 U.S. at 62. The *Talley* decision concluded that an ordinance prohibiting the anonymous distribution of political protest leaflets is a form of censorship forbidden by the First Amendment. The Court explained:

> We have recently had occasion to hold in two cases that there are times and circumstances when States may not compel members of groups engaged in the dissemination of ideas to be publicly identified. *Bates* v. *Little Rock*, 361 U.S. 516 [(1960)]; *NAACP* v. *Alabama*, 357 U.S. 449, 462 [(1958)]. The reason for these holdings is that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance. This broad Los Angeles ordinance is subject to the same infirmity.

362 U.S. at 65. The Ohio statute challenged in this case has the same constitutional infirmity condemned in *Talley*. It prohibits completely truthful leaflets simply because they are anonymous. It prohibits all such leaflets even though they are not fraudulent or misleading in any way. Moreover, the statute makes no distinction between leaflets that discuss ballot issues and leaflets that discuss candidates for public office.

In an attempt to distinguish *Talley*, the Ohio Supreme Court held that "unlike *Talley*, the [Ohio] disclosure requirement is clearly meant to 'identify those responsible for fraud, false advertising and libel.' " 67 Ohio St.3d at 394 (quoting *Talley*, 362 U.S. at 64). The purported distinction is unpersuasive for the simple but fundamental reason that nothing in the language of § 3599.09 limits its application to "fraud, false advertising and libel." On the contrary, § 3599.09 applies with equal force to truthful statements and statements of political opinion. The fact that petitioner has been ordered to

pay a fine of $100 simply for distributing a political leaflet advocating a vote against a local school tax levy evidences the unconstitutional sweep of § 3599.09.

If anything, the effort to justify § 3599.09 as a means to prevent fraud and libel only underlines its resemblance to the ordinance struck down in *Talley* where a similar argument was made and rejected. Writing for the majority in *Talley*, Justice Black wrote: "Counsel [for the City of Los Angeles] has urged that this ordinance is a way to identify those responsible for fraud, false advertisng and libel. Yet the ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose." 362 U.S. at 64. The same is true of R.C. § 3599.09. It bars *all* anonymous leaflets that address voters in referenda and elections of candidates. There are no exceptions. Moreover, Ohio has other statutes specifically regulating false statements during elections. *See* R.C. §§ 3599.091(B) and 3599.092(B)(2). This was acknowledged in the dissent below. 67 Ohio St.3d at 400-401.

Even if there were a legislative history indicating that the purpose of the Ohio statute was to prevent "fraud, false advertising and libel", it would still be invalid. Ohio Revised Code § 3599.09 is being applied, in this case, exactly as it is drafted — to ban the distribution of a political leaflet that seeks to persuade voters to vote against a school tax levy. Thus, like the Los Angeles ordinance, § 3599.09 "is not limited to handbills whose content is 'obscene or offensive to public morals or that advocates unlawful conduct.' " 362 U.S. at 64 (quoting *Lovell* v. *Griffin*, 303 U.S. at 451). Indeed, § 3599.09 is so broad that it reaches all election-related leafletting in quintessential public forums. In addition to prohibiting anonymous leaflets urging a vote against a referendum issue, it also prohibits unsigned political placards on front lawns. It may even prohibit unsigned letters to the editors of newspapers

The Ohio Supreme Court's second attempt to distinguish *Talley* is equally unavailing. Specifically, the decision below

incorrectly states that *Talley* does not apply to statutes imposing disclosure requirements on leaflets addressing voters during elections. In order to support this position, the Ohio Supreme Court relies on *First Nat'l Bank of Boston* v. *Bellotti*, 435 U.S 765 (1978), a case which upholds the First Amendment right of business corporations to make donations designed to persuade voters in referendum elections. The Ohio Supreme Court mistakenly contends that footnote 32 from *Bellotti* supports the constitutionality of § 3599.09 because it suggests, in dicta, that corporations that engage in political advertising may be subject to disclosure requirements in some circumstances:

> Corporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. *Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected. See Buckley [v. Valeo]*, 424 U.S. [1], at 66-67, [96 S. Ct. 612, at 657-658, 46 L. Ed. 2d 659, at 714-715 (1976)]; *United States* v. *Harriss*, 347 U.S. 612, 625-626 [74 S. Ct. 808, 815-817, 98 L. Ed. 989, 1001] (1954). *In addition, we emphasized in Buckley the prophylactic effect of requiring that the source of communication be disclosed.* 424 U.S. at 67 [96 S. Ct. at 657, 46 L. Ed. 2d, at 715]. (Emphasis added [by the Ohio Sup. Ct.]) 435 U.S. at 792, 98 S. Ct. at 1424, 55 L. Ed. 2d at 728.

67 Ohio St.3d at 395.

The Ohio Supreme Court's reliance on the *Bellotti* footnote underscores the defects in its reasoning. As Justice Wright pointed out in his dissent below, the *Bellotti* approval of disclosure requirements is confined to election-related activities by corporations. The *Bellotti* court was careful to make clear that the power of the state to regulate election-related conduct of corporations posed questions that were distinct from the power to regulate election-related speech of

individuals. 67 Ohio St.3d 398-399 (quoting *Bellotti*, 435 U.S at 777-778). Indeed, the right of individuals to distribute leaflets in public places has little in common with the regulation of corporate activities during elections and referenda. *Austin* v. *Michigan State Chamber of Commerce*, 494 U.S. 652 (1990).

Moreover, the only election disclosure requirements applicable to individuals that the Court has upheld required disclosure of anonymous partisan campaign contributions. *Buckley* v. *Valeo*, 424 U.S. 1 (1976). Petitioner's conduct cannot be measured by *Buckley* or its progeny, because the petitioner in this case is a leafletter who seeks to spread her opinions by means of the printed word communicated through a hand-to-hand exchange. Her expression cannot be limited by decisions of the Court applicable to campaign financing.

b. The Ohio Supreme Court did not require that section 3599.09 advance a compelling state interest.

In order for Ohio to justify its statute burdening the First Amemdment by prohibiting distribution of anonymous political leaflets, it must establish that the statute advances a compelling state interest. Indeed, this Court has repeatedly stated that if a state law burdens basic First Amendment rights, the law is invalid in the absence of a compelling state interest. *Talley* v. *California*, 362 U.S. at 66 (Harlan, J., concurring); *NAACP* v. *Alabama*, 357 U.S. 449, 463, 464 (1958); *Buckley* v. *Valeo*, 424 U.S. 1, 64 (1976).

Implicitly recognizing that § 3599.09 could not survive such scrutiny, the Ohio Supreme Court erroneously applied a lesser standard of review to § 3599.09 because it is an election statute. Rather than being governed by *Talley* v. *California* and other strict scrutiny cases, the decision below stated that petitioner's leafletting activities are governed by *Burdick* v. *Takushi*, 112 S. Ct. 2059 (1992) which upheld Hawaii's ban on write-in voting:

> *[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as the petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. . . .* Accordingly, *the mere fact that a State's system "creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny."* *Bullock* v. *Carter*, 405 U.S. 134, 143 [92 S. Ct. 849, 856, 31 L. Ed. 2d 92, 100] (1972); *Anderson [v. Celebrezze]*, 460 U.S. 780, 788, [103 S. Ct. 1564, 1569-1579, 75 L. Ed. 2d 547, 557]; *McDonald* v. *Board of Elections Commr's of Chicago*, 394 U.S. 802 [89 S. Ct. 1404, 22 L. Ed. 2d 739] (1969).

67 Ohio St.3d at 395. (Emphasis in original.)

The Ohio Supreme Court is wrong. *Takushi* is not applicable to this case because § 3599.09 does not regulate the mechanics of voting. Instead, it regulates the content of political leaflets in public places because they seek to persuade voters. The correct governing constitutional standard is set out in *Talley* v. *California*, which states: "[O]ne who is rightfully on a street . . . carries with him there as elsewhere the constitutional right to express his views in an orderly fashion . . . by handbills and literature as well as by the spoken word." 362 U.S. at 63, (quoting *Jamison* v. *Texas*, 318 U.S. 413, 416 (1943)). As a consequence, Ohio's restriction on leafletting must be measured by strict First Amendment standards applicable to regulation of the content of speech in public places. The applicable standard was stated in Justice Harlan's concurring opinion in *Talley*: "[S]tate action impinging on free speech and association will not be sustained unless the governmental interest asserted to support such impingement is compelling." 362 U.S. at 66 (Harlan, J., concurring).

The applicability of the compelling state interest standard to this case is underscored by *Burson* v. *Freeman*, 112 S. Ct.

1846 (1992)[6] There, the Court used the compelling state interest test to measure the constitutionality of a Tennessee law that prohibited the solicitation of voters within 100 feet of a polling place. In the course of upholding the statute, the Court explained that "a facially content-based restriction on political speech in public forum . . . must be subjected to exacting scrutiny: The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.' " 112 S. Ct. at 1851, (quoting *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The compelling state interest analysis employed by the Court in *Burson* is equally applicable to this case because, as was true in *Burson*, the statute at issue here governs distribution of constitutionally protected election-related leaflets and pamphlets in public places.

In an effort to justify § 3599.09, the Ohio Supreme Court also states that the statute is supported by the state's interest in providing information about a leafletter's identity. The defect in the Ohio Supreme Court's view that § 3599.09 assists in informing voters was explained by the New York court in *State of New York* v. *Duryea*, 76 Misc. 2d 948, 351 N.Y.S.2d 978, 996, *aff'd* 44 A.D.2d 663, 354 N.Y.S.2d 129 (1974), which invalidated a similar statute:

> Of course the identity of the source is helpful in evaluating ideas. But "the best test of truth is the power of the thought to get itself accepted in the competition of the market." (*Abrams* v. *United States*, 250 U.S. 616 (1919) (Holmes, J.) Don't underestimate the common man. People are intelligent enough to evaluate the scource of an anonymous writing. They can see it is anonymous. They can evaluate its

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[6] It should be noted that *Burson*, which employed a compelling state interest test in an election context was decided in the same term as *Burdick* v. *Takusi*, *supra*, the case relied on by the court below.

> anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is "responsible," what is valuable, and what is truth.

See also Mills v. *Alabama*, 384 U.S. 214 (1966) (invalidating an Alabama statute prohibiting election day editorials urging readers to vote a particular way).

The presence or absence of petitioner's name on her leaflets has nothing to say about the value of the ideas the leaflets advocate. Moreover, allowing people to evaluate anonymous writings for themselves is particularly appropriate in the context of petitioner's distribution of leafets directed at the merits of a non-partisan referendum. Since the leaflets address the merits of the referendum, neither the leaflets nor the leafletter is in a position to mislead voters about a candidate or to encourage political misconduct by elected officials. Thus, "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Citizens Against Rent Control/Coalition for Fair Housing* v. *City of Berkeley*, 454 U.S. 290, 299 (1981).

The principal reason that compelled disclosure has never been a valid way to restrict anonymous political leafletting is that anonymous leafletting has long been regarded as a means to protect speakers against government retaliation. According to this Court in *Talley*:

> Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The

> old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers.

362 U.S. at 64-65.

In fact, there is evidence in the record of this case that school officials are using § 3599.09 as a means to punish the petitioner for her opposition to tax levies designed to raise money for the Westerville public schools. According to Ohio Supreme Court Justice Craig Wright's dissenting opinion:

> Indeed, in this case, it is possible that the very filing of the charge against McIntyre was in some measure in retaliation for her opposition to the school levy. Certainly, the timing of filing is suspect. McIntyre distributed the leaflets in April 1988, but the complaint was not filed until one year later. According to McIntyre, in the intervening period the school levy had been defeated twice but succeeded on the third attempt shortly prior to the filing of the complaint. It would appear that as soon as the levy was safely passed, the school district, in the person of the assistant superintendent of elementary education, sought retribution against McIntyre for her opposition. If the reasons espoused by the majority as justification for the constitutionality of the statute, i.e., educating the electorate and prevention of fraud in elections, were to be furthered, the charge should have been filed at the time of the purported offense, not one year and three elections later.

67 Ohio St.3d at 398, (Wright, J., dissenting).

In short, the decision below is more than wrong; it undermines our system of free expression and our national commitment to "robust debate." *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964).

II. Ohio Revised Code section 3599.09 is unconstitutional as applied to punish distribution of anonymous leaflets that advocate defeat of a school tax referendum.

No matter how § 3599.09 is interpreted by the Ohio courts, petitioner cannot be punished for distributing leaflets urging voters to vote against a ballot issue. This is true, even assuming the accuracy of the Ohio court's conclusion that § 3599.09 is facially constitutional because it has "as its purpose the identification of persons who distribute materials containing false statements." 67 Ohio St.3d at 394. The unconstitutional application lies in the fact that there is no evidence or allegation that petitioner's leaflets contained any libelous or misleading statements of fact. On the contrary, the record is clear that petitioner's leafletting was classic political advocacy.

Under the First Amendment, no one can be punished simply for handing out an anonymous leaflet communicating an opinion that voters should vote against a tax increase. Such opinions cannot be measured by a "true or false" standard in the way that statements of fact about people can be. A leaflet containing an opinion about a ballot issue cannot contain the kind of false statement that the Ohio Supreme Court says is subject to regulation under § 3599.09. As this Court said in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), "under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 339-340. Similarly, *Milkovich* v. *Lorain Journal Co.*, 497 U.S. 1 (1990) holds that statements of fact on matters of public concern must be proved false before they are subject to the sanction of a defamation award.

The teachings of *Gertz* and *Milkovich* are particularly appropriate in this case because petitioner's leaflet was directed against a ballot issue rather than a candidate. While it may be possible to libel a candidate for public office, it is impossible to libel a referendum issue. In the period immediately

preceding an election, candidates might be vulnerable to malicious falsehoods about their private and professional lives. In contrast, no such vulnerability exists for a referendum on a school tax levy. Arguments favoring a ballot issue can be met with arguments opposing it. Such is the give and take in the marketplace of ideas.

The distinction between a referendum and an election for public office was made clear in *Citizens Against Rent Control/Coalition for Fair Housing* v. *Berkeley*, 454 U.S. 290 (1981). In that case, this Court invalidated an ordinance imposing a $250 limit on personal contributions to committees formed to support or oppose ballot measures. Chief Justice Burger's opinion found the contribution limit to be an unconstitutional interference with rights of association and individual and collective rights of expression. He made clear that contribution limits were designed to protect candidates against corruption and undue influence. *Id.* at 297. He also made clear that "the risk of corruption perceived in cases involving candidate elections is simply not present in a popular vote on a public issue." *Id.* at 298.

The Ohio Supreme Court's application of § 3599.09 to Petitioner McIntyre's leafletting fails to recognize the existence of any distinction between candidate elections and referendum elections. According to the Ohio court, Ms. McIntyre is obligated to put her name and address on any leaflet containing any advocacy related to an election. In reaching this conclusion, the state court exceeds its constitutional authority by ignoring the distinction between candidate elections and referenda on public issues.

III. The decision of the Ohio Supreme Court conflicts with decisions by courts in several other states.

It is important for this Court to review the Ohio Supreme Court's opinion in this case in order to clarify the First Amendment principles applicable to § 3599.09. The Ohio Supreme Court's opinion in this case, refusing to follow

Talley v. *California*, is generating a serious conflict of legal authority. Since this Court's decision in *Talley*, courts considering similar statutes in at least eight other states have relied on *Talley* to find such statutes to be unconstitutional. *Wilson* v. *Stocker*, 819 F.2d 943 (10th Cir. 1987); *Illinois* v. *White*, 116 Ill. 2d 171, 506 N.E.2d 1284 (1987); *Schuster* v. *Imperial County Municipal Court*, 109 Cal. App. 3d 887, 167 Cal. Rptr. 447 (1980), *cert. denied* 450 U.S. 1042 (1981); *State of North Dakota* v. *North Dakota Education Association*, 262 N.W.2d 731 (1978); *State of Louisiana* v. *Fulton*, 337 So. 2d 866 (1976); *Commonwealth of Massachusetts* v. *Dennis*, 368 Mass. 92, 329 N.E.2d 706 (1975); *State of New York* v. *Duryea*, 76 Misc. 2d 948, 351 N.Y.S.2d 978 (1974); *State of Idaho* v. *Barney*, 92 Idaho 581, 448 P.2d 195 (1968).

In contrast, prior to this case, only *Morefield* v. *More*, 540 S.W.2d 873 (Ky. 1976) and *United States* v. *Insco*, 365 F. Supp. 1308 (M.D. Fla. 1973) had cited *Talley* and refused to afford constitutional protection to anonymous speech. The Ohio Supreme Court is now the third case that cites *Talley* in the course of denying First Amendment protection to anonymous speech.

Presently, a great many states have statutes similar to § 3599.09.[7] There has been only periodic enforcement of

[7] They include Ala. Code §§ 17-22A-12, 17-22A-13 (1992); Alaska Stat. § 15.56.010 (1992); Ark. Code Ann. § 7-1-103 (Michie 1992); Colo. Rev. Stat. § 1-13-108 (1992); Conn. Gen. Stat. § 9-333w (1990) (Michie 1992); Idaho Code § 67-6614A (1992); Ind. Code Ann. § 3-14-1-3 (Burns 1992); Iowa Code § 56.14 (1991); Md. Ann. Code art. 33, § 26-17 (1992); Mass. Ann. Laws ch. 56, § 41 (Law. Co-op. 1992); Minn. Stat. § 211B.04 (1992); Miss. Code Ann. § 23-15-899 (1991); Mon. Code Ann. § 13-35-225 (1992); Neb. Rev. Stat. § 49-1474.01 (Supp. 1992); Nev. Rev. Stat. Ann. § 294A.320 (Michie 1991); N.H. Rev. Stat. Ann. § 665:14 (1991); N.J. Rev. Stat. § 19:34-38.1 (1992); N.M. Stat. Ann. §§ 1-19-16, 1-19-17 (Michie 1992); Or. Rev. Stat. § 260.522 (1991); R.I. Gen. Laws § 17-23-1 (1991); S.D. Codified Laws Ann. § 12-25-4.1 (1992); Tenn. Code Ann. § 2-19-120 (1992); Va. Code Ann. § 24.1-277 (Michie 1992); W. Va. Code § 3-8-12 (1992); Wis. Stat. § 11.30 (1989-1990); Wyo. Stat. § 22-25-110 (1992).

these statutes. It would appear that most states are deferring to this Court's holdings protecting anonymous leafletting. If the Ohio Supreme Court decision is allowed to stand, it will serve as a forceful invitation to the states to enforce such laws. Thus, when public officials are confronted by opponents distributing anonymous leaflets, the officials will have a new weapon to censor core political advocacy. This is exactly the burden on free speech that the First Amendment was designed to prevent.

CONCLUSION

A statute prohibiting the distribution of anonymous leaflets that address ballot issues violates the First Amendment. In upholding such a statute, the Ohio Supreme Court has declined to accede to the precedent set by *Talley* v. *California* and the cases that follow it. Petitioner therefore requests that this Court grant her petition for certiorari or summarily reverse the ruling of the court below.

Respectfully submitted,

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APPENDIX

McINTYRE, APPELLANT, *v.* OHIO ELECTIONS COMMISSION, APPELLEE.

67 Ohio St.3d 391

The requirement of R.C. 3599.09 that persons responsible for the production of campaign literature pertaining to the adoption or defeat of a ballot issue identify themselves as the source thereof is not violative of the right to free speech guaranteed by the First Amendment to the United States Constitution and Section 11, Article I of the Ohio Constitution.

(No. 92-1147—Submitted June 1, 1993—Decided September 22, 1993.)

APPEAL from the Court of Appeals for Franklin County, No. 90AP-1221.

On April 27, 1988, appellant, Margaret McIntyre, distributed flyers at Blendon Middle School in Westerville, Ohio, to attendees of a meeting held to discuss the Westerville school levy. The levy had been placed on the May 3, 1988 primary election ballot. Similar flyers were deposited upon the windshields of automobiles in the school parking lot by a relative of appellant and by another person. The leaflets generally expressed opposition by appellant to the school levy. Some of the flyers failed to include the name and address of appellant as the person who produced them. Appellant was apprised of the nonconformity of this campaign literature by J. Michael Hayfield, Assistant Superintendent of Elementary Education for the Westerville City School District. Nevertheless, on April 28, 1988, appellant distributed similar leaflets outside the Walnut Springs Middle School in Westerville.

On March 30, 1989, a complaint against appellant was filed with appellee, Ohio Elections Commission ("OEC"),

charging her, *inter alia*, with violations of R.C. 3599.09 —distribution of campaign literature without a proper disclaimer. On March 19, 1990, a hearing was held before the OEC. On March 30, 1990, appellee issued its decision finding appellant in violation of R.C. 3599.09, and fining her $100. On April 6, 1990, appellant instituted an appeal to the Franklin County Common Pleas Court. On October 2, 1990, the common pleas court reversed the decision of appellee, concluding that R.C. 3599.09 was unconstitutional as applied. On April 7, 1992, the Tenth District Court of Appeals reversed the trial court.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

George Q. Vaile, for appellant.

Lee I. Fisher, Attorney General, *Robert A. Zimmerman* and *Patrick A. Devine*, Assistant Attorneys General, for appellee.

A. WILLIAM SWEENEY, J. The present action involves the constitutionality of R.C. 3599.09 insofar as it requires the identification of the author of campaign literature. In this regard, R.C. 3599.09 provides in relevant part:

"(A) *No person shall write, print, post, or distribute*, or cause to be written, printed, posted, or distributed, *a notice*, placard, dodger, advertisement, sample ballot, *or any other form of general publication which is designed* to promote the nomination or election or defeat of a candidate, or *to promote the adoption or defeat of any issue*, or to influence the voters in any election, or make an expenditure for the purpose of financing political communication through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, *unless there appears on such form of publication in a conspicuous place or is contained within said statement the name*

and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or *the person who issues, makes, or is responsible therefor.* * * * This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution." (Emphasis added.)

It is the contention of appellant that the aforementioned restriction violates her right to free speech under Section 11, Article I of the Ohio Constitution, which provides in part:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."

In reversing the common pleas court, the court of appeals relied upon the holding of this court in *State v. Babst* (1922), 104 Ohio St. 167, 135 N.E. 525. The syllabus thereto provides:

"Section 13343-1, General Code, appearing in Part Four, Title I, Chapter 18, entitled 'Offenses Relating To Elections,' in its operation does not restrain or abridge the liberty of speech as guaranteed by Section 11, Article I, Bill of Rights, but is regulatory in nature, and intended to prevent abuse of the right."

G.C. 13343-1 is the predecessor to R.C. 3599.09 and does not differ from it to any material extent. Nevertheless, appellant questions the continued vitality of *Babst* in light of subsequent decisions by the United States Supreme Court interpreting the First Amendment to the United States Constitution. In particular, appellant relies upon *Talley* v. *California* (1960), 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559. In *Talley*, the court invalidated a city ordinance on the basis that its requirement that handbills contain the name and address of the person producing them was an unconstitutional infringement on the right to free speech. The handbills had as their purpose the organization of a consumer boycott of particular merchants who allegedly practiced racial discrimination. In concluding that the identification of the author of the

handbill would run afoul of the First Amendment, the *Talley* court remarked:

"There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression. 'Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' *Lovell* v. *Griffin*, 303 U.S., at [444,] 452 [58 S.Ct. 666, 669, 82 L.Ed. 949, 954 (1938)].

"Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all. The obnoxious press licensing law of England, which was also enforced on the Colonies was due in part to the knowledge that exposure of the names of printers, writers and distributors would lessen the circulation of literature critical of the government. The old seditious libel cases in England show the lengths to which government had to go to find out who was responsible for books that were obnoxious to the rulers. John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England. Two Puritan Ministers, John Penry and John Udal, were sentenced to death on charges that they were responsible for writing, printing or publishing books. Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names. It is plain that anonymity has sometimes been assumed for the most constructive purposes." (Footnotes omitted.) 362 U.S. at 64-65, 80 S.Ct. at 538-539, 4 L.Ed.2d at 563.

However, the ordinance at issue in *Talley* apparently had as its only purpose the identification of the author of the handbills. Thus, in distinguishing the ordinance from other provisions which sought to prevent the dissemination of falsehoods, the court remarked:

"Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose. *Therefore we do not pass on the validity of an ordinance limited to prevent these or any other supposed evils.* This ordinance simply bars all handbills under all circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires." (Emphasis added.) 362 U.S. at 64, 80 S.Ct. at 538, 4 L.Ed.2d at 562-563.

In contrast to the ordinance at issue in *Talley*, appellee can legitimately claim that R.C. 3599.09 has as its purpose the identification of persons who distribute materials containing false statements. R.C. 3599.091(B) and 3599.092(B)(2) prohibit persons from making false statements during campaigns for public office and ballot issues, respectively. Accordingly, unlike *Talley*, the disclosure requirement is clearly meant to "identify those responsible for fraud, false advertising and libel." Moreover, in *First Natl. Bank of Boston* v. *Bellotti* (1978), 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, the United States Supreme Court, while concluding that a state statute prohibiting corporate expenditures opposing or supporting ballot issues was violative of the First Amendment, nevertheless acknowledged that requirements such as the one at issue in the case herein were permissible. In rejecting the argument of the state that restrictions on corporate speech were necessary in order to allow alternative voices to be heard, the court remarked as follows:

"Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. [Footnote omitted.] They

may consider, in making their judgment the source and credibility of the advocate. [Court's footnote 32.]" 435 U.S. at 791-792, 98 S.Ct. at 1423-1424, 55 L.Ed.2d at 727-728.

The court's footnote 32 states:

"Corporate advertising, unlike some methods of participation in political campaigns, is likely to be highly visible. *Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected.* See *Buckley [*v. *Valeo]*, 424 U.S. [1], at 66-67 [96 S.Ct. 612, at 657-658, 46 L.Ed.2d 659, at 714-715 (1976)]; *United States* v. *Harriss*, 347 U.S. 612, 625-626 [74 S.Ct. 808, 815-817, 98 L.Ed. 989, 1001] (1954). *In addition, we emphasized in Buckley the prophylactic effect of requiring that the source of communication be disclosed.* 424 U.S., at 67 [96 S.Ct., at 657, 46 L.Ed.2d, at 715]." (Emphasis added.) 435 U.S. at 792, 98 S.Ct. at 1424, 55 L.Ed.2d at 728.

Significantly, the court made this observation in a case where it also stated that a governmental entity was required to demonstrate a compelling interest to justify a restriction on First Amendment rights. However, in *Burdick* v. *Takushi* (1992), 504 U.S. ____, 112 S.Ct. 2059, 119 L.Ed.2d 245, the court, in upholding the ban on write-in voting instituted by the state of Hawaii, recognized a different standard. The court observed as follows:

"Election laws will invariably impose some burden upon individual voters. Each provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to association with others for political ends.' *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 [103 S.Ct. 1564, 1569-1570, 75 L.Ed.2d 547, 557] (1983). Consequently, *to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest*, as petitioner suggests, *would tie the hands of States seeking to assure that elections are operated equitably and efficiently.* See Brief for

Petitioner 32-37. Accordingly, *the mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.' Bullock* v. *Carter*, 405 U.S. 134, 143 [92 S.Ct. 849, 856, 31 L.Ed.2d 92, 100] (1972); *Anderson, supra*, 460 U.S., at 788 [103 S.Ct., at 1569-1570, 75 L.Ed.2d, at 557]; *McDonald* v. *Board of Election Comm'nrs of Chicago*, 394 U.S. 802 [89 S.Ct. 1404, 22 L.Ed.2d 739] (1969).

"Instead, as the full Court agreed in *Anderson, supra*, 460 U.S., at 788-789 [103 S.Ct., at 1569-1570, 75 L.Ed.2d, at 557-558]; *id.*, at 808, 817 [103 S.Ct., at 1580, 1584-1585, 75 L.Ed.2d, at 576] (REHNQUIST, J., dissenting), a more flexible standard applies. *A court considering a challenge to a state election law must weight 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.' Id.*, at 789 [103 S.Ct., at 1570, 75 L.Ed.2d, at 558]; *Tashjian [v. Republican Party of Conn.], supra*, 479 U.S. [208], at 213-214 [107 S.Ct. [544], at 547-548, 93 L.Ed.2d 514, at 523 (1986)].

"*Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.* Thus, as we have recognized when those rights are subjected to 'severe' restrictions the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' *Norman* v. *Reed*, 502 U.S. ____, ____ [112 S.Ct. 698, 705, 116 L.Ed.2d 711, 723] (1992). But *when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions. Anderson, supra*, 460 U.S., at 788 [103 S.Ct., at 1569-1570, 75 L.Ed.2d, at 557]; see also *id.*, at 788-789, n. 9 [103 S.Ct.,

at 1569-1579, 75 L.Ed.2d at 557-558]." (Emphasis added.) 504 U.S. at ____, 112 S.Ct. at 2063-2064, 119 L.Ed.2d at 253-254.

The minor requirement imposed by R.C. 3599.09 that those persons producing campaign literature identify themselves as the source thereof neither impacts the content of their message nor significantly burdens their ability to have it disseminated. This burden is more than counterbalanced by the state interest in providing the voters to whom the message is directed with a mechanism by which they may better evaluate its validity. Moreover, the law serves to identify those who engage in fraud, libel or false advertising. Not only are such interests sufficient to overcome the minor burden placed upon such persons, these interests were specifically acknowledged in *Bellotti* to be regulations of the sort which would survive constitutional scrutiny.

We therefore conclude that the requirement of R.C. 3599.09 that persons responsible for the production of campaign literature pertaining to the adoption or defeat of a ballot issue identify themselves as the source thereof is not violative of the right to free speech guaranteed by the First Amendment to the United States Constitution and Section 11, Article I of the Ohio Constitution.

Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY and PFEIFER, JJ., concur.

WRIGHT, J., dissents.

WRIGHT, J., dissenting. I must dissent because I do not agree with the majority that R.C. 3599.09(A) imposes a "minor requirement" that "persons producing campaign literature identify themselves as the source thereof," nor do I agree that this requirement "neither impacts the content of

their message nor significantly burdens their ability to have it disseminated." I am sure that Publius and Cato would have strenuously disagreed with the majority as well.

The most important ballot issue in the history of this country was the political campaign concerning ratification of the United States Constitution. One of the longest and most energetic campaigns occurred in New York. Both positions, for and against ratification, were vigorously debated. "Cato," believed to be New York Governor George Clinton, expressed the position of the opponents of ratification of the Constitution, the antifederalists. "Publius," a pseudonym used by Alexander Hamilton, John Jay and James Madison, expressed the position of the supporters of ratification of the Constitution, the federalists. "Many commentaries on the constitution were written under pseudonyms, both to protect the author and to make full use of available symbols. Heroes of the Roman Republic were popular choices, because many were well-known symbols of republicanism." Roots of the Republic: American Founding Documents Interpreted (Schechter Ed. 1990) 293. Preeminent among the commentaries was The Federalist, the essays written by Hamilton, Jay and Madison under the pseudonym of Publius. Historians argue that a complete understanding of the purpose of The Federalist requires that it be seen as three documents in one. *"It is a campign document designed to win popular approval among the voters of New York State for the proposed Constitution;* a serious work of political thought, analyzing the nature of free societies; and the authoritative commentary on the Constitution, reflecting the intent of the Framers of the Constitution." (Emphasis added.) *Id.* at 291. I think that James Madison, the author of the Bill of Rights, would be very surprised by the decision of the majority that a citizen does not have the right to issue anonymous statements expressing her views on ballot issues.

Nor does the United States Supreme Court agree with the statement of the majority that disclosure requirements do not burden the ability to disseminate expressions of political views. That court has said that *"[t]here can be no doubt* that

such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression." (Emphasis added.) *Talley* v. *California* (1960), 362 U.S. 60, 64, 80 S.Ct. 536, 538, 4 L.Ed.2d 559, 563. The court was concerned that compelled disclosure can chill the exercise of free expression by persons who hold unpopular views and who may fear reprisal for their views.

I believe that the majority minimizes the effect this statute has on the ability of individual citizens to freely express their views in writing on political issues. Many ballot issues, even ones of purely local interest, are controversial. School levies and other tax issues, and zoning issues all can generate strong opinions about their merits. Indeed, in this case, it is possible that the very filing of the charge against McIntyre was in some measure in retaliation for her opposition to the school levy. Certainly, the timing of the filing is suspect. McIntyre distributed the leaflets in April 1988, but the complaint was not filed unitl one year later. According to McIntyre, in the intervening period the school levy had been defeated twice but succeeded on the third attempt shortly prior to the filing of the complaint. It would appear that as soon as the levy was safely passed, the school district, in the person of the assistant superintendent of elementary education, sought retribution against McIntyre for her opposition. If the reasons espoused by the majority as justification for the constitutionality of the statute, *i.e.*, educating the electorate and prevention of fraud in elections, were to be furthered, the charge should have been filed at the time of the purported offense, not one year and three elections later.

Since disclosure requirements can significantly burden freedom of expression, it remains for us to determine whether they are constitutional because of an overriding state interest. The majority traces a line of United States Supreme Court decisions to give the impression that the United States Supreme Court has implicitly ruled that disclosure requirements are constitutional and that the test to be applied is not a strict scrutiny test, in which the state must show a compelling state interest, but a lesser test satisfied merely by

showing a legitimate state interest. Such is not the case. The error the majority makes is failing to distinguish the nature of the disclosure requirement (whether disclosure involves authorship of campaign literature, disclosure of contributions or expenditures) and the parties who are subject to the disclosure requirement (individuals, candidates, and/or organizations). R.C. 3599.09(A) requires disclosure of authorship of political opinions and applies to a wide range of disseminators of those political opinions, including individual citizens, candidates, political committees, political parties, for-profit corporations and non-profit corporations.

The United States Supreme Court has recognized such distinctions when considering the validity of election laws. The court has indicated that restrictions which may be constitutionally valid against organizations may not be valid against individuals. For example, in the case of *First Natl. Bank of Boston* v. *Bellotti* (1978), 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707, cited by the majority, in which the court declared unconstitutional a state ban against corporate expenditures for the purpose of influencing votes on referenda issues, the court stated: "Nor is there any occasion to consider in this case whether, under different circumstances, a justification for a restriction on speech that would be inadequate [*i.e.*, unconstitutional] as applied to individuals might suffice to sustain the same restriction as applied to corporations, unions or like entities." *Id.* at 777-778, 98 S.Ct. at 1416, 55 L.Ed.2d at 718, fn. 13. The Supreme Court has sustained ceilings on political contributions but held invalid limitations on independent expenditures by individuals and groups. *Buckley* v. *Valeo* (1976), 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659. In addition, the court has recognized a distinction between for-profit corporations' contributions concerning referenda issues and such contributions for candidates. *Bellotti*, *supra*, at 788, 98 S.Ct. at 1422, 55 L.Ed.2d at 725, fn. 26.

These distinctions must be kept in mind when considering the majority's reliance on the Supreme Court's *dicta* in footnote 32 in *Bellotti*, which the majority construes to mean that

disclosure requirements are constitutional. Placed in the proper context, it is apparent that the *Bellotti* court's comments are limited to the facts of *Bellotti* (corporate expenditures), as the court expressly refers to disclosure requirements for "corporate advertising." *Bellotti, supra,* at 792, 98 S.Ct. at 1424, 55 L.Ed.2d at 728, fn. 32.

The case before us involves a challenge to R.C. 3599.09 as applied to an individual citizen, not a citizen who is a candidate, nor a political committee, a political party or a corporation. What is the proper test to be applied to determine whether the state has an interest sufficient to justify the restraint on a citizen's right of expression created by a disclosure requirement? The majority is correct that the United States Supreme Court has held that not every state election law must be subject to strict scrutiny. See *Anderson* v. *Celebrezze* (1983), 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547, and *Burdick* v. *Takuski* (1992), 504 U.S. ____, 112 S.Ct. 2059, 119 L.Ed.2d 245. However the court has ruled that *disclosure requirements* do necessitate a strict scrutiny analysis: "We have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment * * *. We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP* v. *Alabama* [*ex rel. Patterson* (1958), 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488] we have required that the subordinating interest of the State must survive exacting scrutiny." (Citations omitted.) *Buckley* v. *Valeo* (1976), 424 U.S. 1, 64, 96 S.Ct. 612, 656, 46 L.Ed.2d 659, 713. In the present case, the majority errs in applying the lesser standard of a showing of merely a legitimate state interest.

Has the Ohio Elections Commission shown a compelling, not merely legitimate, interest in requiring the disclosure of the name and address of a citizen who distributes a pamphlet on a referendum issue? The majority finds two state interests which are served by this requirement. First, "providing the

voters to whom the message is directed with a mechanism by which they may better evaluate its validity," and, second, "the law serves to identify those who engage in fraud, libel or false advertising." With regard to the interest in educating the electorate, the majority appears to underestimate the electorate by suggesting that they are as moved by who supports a position as by the actual substance of the position. A corollary to this proposition is that anonymity oftentimes forces one to think about the substance of the argument as opposed to focusing on the messenger. In any event, I do not believe that the incremental value in education which is gained in knowing the name of an individual who advocates a position is a sufficiently compelling interest to justify the restraint on freedom of expression.

I recognize the state's interest in assuring that information disseminated about candidates and issues is not fraudulent, false or libelous. Indeed, as an elected official, I am most sympathetic and supportive of this goal. Anyone in public office shares the concern that he or she not be subjected to false accusations. However, under the strict scrutiny test, the statute must be narrowly tailored to further the state's compelling interest. The most direct way to further this interest is to proscribe the dissemination of false, fraudulent or libelous information. This the state has done in R.C. 3599.091(B) and 3599.092(B)(2). One commentator has suggested a way in which a state may narrowly tailor a disclosure requirement so that the statute bears a more direct relationship to furtherance of the state's interest:

"* * * [A] state might choose to limit disclosure requirements to advertisements in newspapers, major periodicals, and the broadcast media. These media have the widest circulation and, arguably, the greatest impact on voters. * * *" Note, Developments in the Law, Elections (1975), 88 Harv.L.Rev. 1111, 1292, fn. 323. R.C. 2599.09(B) is directed at these types of communications.

Removing the requirement that an individual citizen place his or her name and residence address on leaflets does not prevent the state from pursuing the goal of preventing the

dissemination of false information. A person who disseminates false information can be charged with such a violation whether or not his or her name is on the literature. Admittedly it will require additional investigation to determine the source of such a publication. However, the present case clearly shows that the omission of a name on a leaflet does not prevent discovery of the author. Indeed, the identity of the author will *always* be known in order to file a charge alleging violation of R.C. 3599.09(A). If the author has disseminated false, fraudulent or libelous information, the proper course to further the state's interest is to charge the person with a violation of R.C. 3599.091(B) or 3599.092(B)(2), not to charge the person with a violation of R.C. 3599.09(A). Since removing the disclosure requirement for individual citizens will not prevent the state from accomplishing its goal, while disclosure, at best, will merely assist it, I do not find the state's interest has been furthered in the way which is least restrictive of freedom of expression.

I find it notable that each of the judges below who reviewed this case was seriously troubled by the potential unconstitutionality of the statute as applied to McIntyre. The trial court ruled that the statute was unconstitutional as applied to McIntyre. Judge Whiteside agreed with the trial court. Even the majority opinion of the court of appeals, overruling the trial court, expressed serious concern for the constitutionality of the statute as applied to McIntyre, but felt compelled to follow the precedent of this court in *State* v. *Babst* (1922), 104 Ohio St. 167, 135 N.E. 525. The court noted, "[i]n the final analysis, while *Babst* presents obvious deficiencies, the syllabus thereof is so broad that we continue to feel bound thereby; and, if R.C. 3599.09(A) be constitutional on its face as *Babst* decided, we are unable to conclude that it is unconstitutional as applied to [McIntyre] herein. Nonetheless, given the more recent United States Supreme Court cases, this case presents a substantial issue for further analysis by the Supreme Court."

The "obvious deficiencies" in *Babst*, referred to by the appellate court, are that it "contains no discussion of whether

the state interest in prohibiting anonymous political communications was sufficiently compelling to warrant the abridgement of free speech imposed by G.C. 13343-1 and, if so, whether the statute therein was narrowly tailored to serve that compelling state interest." When these questions are answered, particularly in light of *Talley*, I believe the appropriate conclusion is that R.C. 3599.09(A) is not narrowly tailored to serve a compelling state interest and is, therefore, unconstitutional as applied to McIntyre.

For the foregoing reasons, I respectfully dissent.

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

No. 90AP-1221
(REGULAR CALENDAR)

Margaret McIntyre,
Appellant-Appellee,

v.

Ohio Elections Commission,
Appellee-Appellant.

OPINION
Rendered on April 7, 1992

MR. GEORGE Q. VAILE, for appellee.

MR. LEE FISHER, Attorney General, and MR. PATRICK A. DEVINE, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

Appellant, the Ohio Elections Commission ("commission"), appeals from a judgment of the Franklin County Court of Common Pleas reversing the commission's determination that appellee, Margaret McIntyre, violated R.C. 3599.09.

James Michael Hayfield, Assistant Superintendent of Elementary Education of the Westerville City School District, filed a complaint and affidavit with the commission, alleging that he observed appellee distribute a publication relating to a Westerville City Schools tax levy at Blendon Middle School on April 27, 1988; and that such publication did not contain the name and address of the person responsible therefor.

After a hearing on the merits of the foregoing complaint, the commission determined that appellee violated R.C. 3599.09 and imposed a fine of $100 upon appellee. Pursuant to R.C. 119.12, appellee appealed to the common pleas court, which found that the commission's decision was not supported by the record and represented an unconstitutional application of R.C. 3599.09.

Appellant appeals therefrom, assigning the following errors:

> "I. THE LOWER COURT COMMITTED ERROR IN REVERSING THE DECISION OF THE OHIO ELECTIONS COMMISSION ON THE BASIS THE DECISION IS NOT SUPPORTED BY THE RECORD.
>
> "II. THE LOWER COURT COMMITTED ERROR IN REVERSING THE DECISION OF THE OHIO ELECTIONS COMMISSION ON THE BASIS THAT R.C. 3599.09 IS UNCONSTITUTIONAL AS APPLIED TO MARGARET McINTYRE'S ACTIVITIES."

Appellee filed no notice of appeal, but nevertheless assigns the following error:

> "The court below ruled improperly when it failed to find that ORC 3599.09 is overbroad and unconstitutional on its face in that it infringes First Amendment protected speech of individual citizens of the state and nation."

Appellee having filed no notice of appeal, we will consider her assignment of error only to the extent necessary to prevent a reversal of the common pleas court's judgment. R.C. 2505.22.

Appellant's first assignment of error asserts that the common pleas court erred in determining that the commission's decision was not supported by the record.

R.C. 3599.09(A) provides as follows:

> "No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed * * * to promote the adoption or defeat of any issue, or to influence the voters in any election, * * * unless there appears on such form of publication in a conspicuous place or is contained within such statement the name and residence or business address of * * * the person who issues, makes, or is responsible therefor. * * * This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution."

Thus, any person who distributes a publication designed to promote the adoption or defeat of a ballot issue, without the name and address of the person responsible for such publication appearing conspicuously thereupon, violates R.C. 3599.09(A), unless such publication constitutes "personal correspondence that is not reproduced by machine for general distribution."

Appellee testified before the commission that all copies of the publication disputed herein were reproduced either by a personal computer or by a commercial printer; therefore that publication was reproduced by machine. The record further reveals that appellee distributed the publication in issue to the public generally at Blendon Middle School on April 27, 1988; no indication exists that appellee distributed that publication only to particular recipients.

A machine-reproduced publication is for general distribution if it is transmitted to the public generally, regardless of the means of such transmittal; the focus is on the identity of the recipients of the publication rather than its distributor. Hence, transmittal of a machine-reproduced publication by the person responsible therefore does not render that publication personal correspondence not for general distribution when the transmittal is made to the public generally. Since the machine-reproduced publication in issue was distributed

to the public generally, appellee's distribution of the publication falls outside the scope of the exception to R.C. 3599.09(A).

Applying R.C. 3599.09 to appellee's conduct, we note that Hayfield testified before the commission that he observed appellee distribute the publication at issue designed to promote the defeat of a Westerville City Schools tax levy, at Blendon Middle School on April 27, 1988; and that such publication did not contain the name and address of the person responsible therefor. Hayfield's testimony, combined with that of appellee, supports the commission's decision that appellee violated R.C. 3599.09(A).

Appellant's second assignment of error asserts that the common pleas court erred in determining that R.C. 3599.09(A) was unconstitutional as applied to appellee. Inasmuch as R.C. 3599.09(A) expressly prohibits the conduct in which appellee has engaged, and the record reveals no irregularity in application of the statute to appellee, we discern no distinction between the constitutionality of R.C. 3599.09(A) on its face and as applied to appellee herein. Thus, R.C. 3599.09(A) is constitutional as applied to appellee if it is constitutional on its face.

In *State* v. *Babst* (1922), 104 Ohio St. 167, the Supreme Court determined that G.C. 13343-1, the predecessor to R.C. 3599.09(A), did not violate Section 11, Article I of the Ohio Constitution. The language of the foregoing statutes is virtually identical, except that R.C. 3599.09(A) requires that a political publication contain the name and address of the person responsible therefor, whereas the statute at issue in *Babst* required that such a publication contain the name and address of a voter responsible therefor.

We cannot say that the difference between the two statutes renders *Babst* inapplicable. Nonetheless, portions of the body of the *Babst* decision suggest that the issue decided therein was the validity of excluding nonvoters as a class from assuming responsibility for political publications rather than the validity of a ban on anonymous political speech. Further, *Babst* contains no discussion of whether the state interest in

prohibiting anonymous political communications was sufficiently compelling to warrant the abridgement of free speech imposed by G.C. 13343-1 and, if so, whether the statute therein was narrowly tailored to serve that compelling state interest. In short, the text of the opinion in *Babst* leaves unclear whether the *Babst* court reached the free speech issues raised herein. However, the syllabus of *Babst* states that:

> "Section 13343-1, General Code, appearing in Part Four, Title I, Chapter 18, entitled 'Offenses Relating To Elections,' in its operation does not restrain or abridge the liberty of speech as guaranteed by Section 11, Article I, Bill of Rights, but is regulatory in nature, and intended to prevent abuse of the right."

Consequently, being bound by the syllabus of *Babst*, we are bound by its determination that R.C. 3599.09(A) is constitutional on its face with respect to free speech considerations, unless a more recent United States Supreme Court decision controls.[1]

The teachings of a more recent United States Supreme Court decision cast doubt upon the continuing viability of Babst.[2] Specifically, the United States Supreme Court determined in *Talley* v. *California* (1960), 362 U.S. 60, 80 S.Ct. 536, that a state statute prohibiting the distribution of handbills not containing the name and address of the person responsible therefore abridged the United States

[1] While *Babst* was decided solely under the free speech provisions of the Ohio Constitution, the provisions of Ohio's Constitution and those of the First Amendment to the United States Constitution, both of which appellee employs in support of her argument, appear to guarantee the same freedoms, *albeit* perhaps more explicitly stated in the Ohio Constitution.

[2] Courts in several states have relied upon the decision of the United States Supreme Court in *Talley* v. *California* (1960), 362 U.S. 60, 80 S.Ct. 536, in declaring statutes analogous to R.C. 3599.09(A) unconstitutional. See, *e.g.*, *Illinois* v. *White* (1987), 116 Ill. 2d 171, 506 N.E. 2d 1284; *Massachusetts* v. *Dennis* (1975), 329 N.E. 2d 706.

Constitution's guarantees of freedom of speech and the press. Although the statute in *Talley* was not limited to a ban on anonymous political handbills, the court therein noted the important role of anonymous political speech in promoting the exchange of ideas which might be unpopular with government authorities. *Id.* at 64-65. The *Talley* court further noted that the constitutional right to express one's views extends to communications of those views "by handbills and literature as well as by the spoken word." *Id.* at 63 (citing *Jamison* v. *Texas* (1943), 318 U.S. 413, 416).

However, *Talley* is distinguishable on its facts from the instant case; the state has a greater interest in prohibiting anonymous political communication to protect against fraudulent and corrupt practices than it has in prohibiting anonymous communications generally. Further, in decisions subsequent to *Talley*, the Supreme Court has suggested a valid interest in preventing anonymous communications in some instances. See *First National Bank of Boston* v. *Bellotti* (1978), 435 U.S. 765, 792 Fn. 32 ("* * * [i]dentification of the source of advertising may be required as a means of disclosure, so that people will be able to evaluate the arguments to which they are being subjected. * * *"); *Citizens Against Rent Control* v. *Berkeley* (1981), 454 U.S. 290, 298-299 ("* * * [t]he public interest allegedly advanced by § 602 — identifying the sources of support for and opposition to ballot measures — is insubstantial because voters may identify those sources under the provision of § 112. * * *"). Indeed, the knowledge of the source of a publication, especially a misleading one, may cause greater public discernment and evaluation than is prompted without such knowledge.

In the final analysis, while *Babst* presents obvious deficiencies, the syllabus thereof is so broad that we continue to feel bound thereby; and, if R.C. 3599.09(A) be constitutional on its face as *Babst* decided, we are unable to conclude that it is unconstitutional as applied to appellee herein. Nonetheless, given the more recent United States Supreme Court cases, this case presents a substantial issue for further analysis by the

Supreme Court. However, given *Babst*, we sustain appellant's second assignment of error, and overrule appellee's assignment of error.

Having sustained appellant's two assignments of error and overruled appellee's sole assignment of error, we reverse the judgment of the trial court, and remand for proceedings consistent herewith.

Judgment reversed
and cause remanded.

PETREE, J., concurs.
WHITESIDE, J., dissents.

WHITESIDE, J., dissenting.

Since I am unable to concur in the judgment reached by the majority, I must respectfully dissent. This is an appeal from the judgment of the Franklin County Court of Common Pleas reversing a decision of the Ohio Elections Commission ("commission") upon an R.C. 119.12 appeal.

This appeal was taken by the Ohio Election Commission.[3] Margaret McIntyre, appellee herein, but appellant in the common pleas court, appealed to that court from a decision of the commission finding appellee, McIntyre, had not violated R.C. 3517.10(D) or R.C. 3517.13(E), but had violated R.C. 3599.09 and, as a result thereof, imposed a fine of $100 upon appellee, McIntyre. Upon appeal by McIntyre from the commission decision, the common pleas court reversed, finding that the decision of the commission "* * * is not supported by the Record and represents an unconstitutional application of Section 3599.09." In its decision, the trial court stated in part:

> "* * * The Court is cognizant of the need to protect the voting process from scandalous, libelous, or

[3] No issue has been raised herein nor determined hereby as to whether the commission is an appropriate party to appeal.

> malicious attempts to degrade its integrity. The freedom to voice one's opinion either for or against an issue or a candidate must however be protected. The Court finds that the statute, as applied to Ms. McIntyre's activity, is unconstitutional. The record does not reflect any attempt by Ms. McIntyre to mislead the public nor act in a surreptitious manner. With due regard to the electoral process, the statute extends too far in requiring Ms. McIntyre to have her name, residence, or further disclaimers upon the flyer."

Appellee, McIntyre, although she has not filed a notice of appeal, raises an assignment of error as follows:

> "THE COURT BELOW RULED IMPROPERLY WHEN IT FAILED TO FIND THAT ORC 3599.09 IS OVERBROAD AND UNCONSTITUTIONAL ON ITS FACE IN THAT IT INFRINGES FIRST AMENDEMENT PROTECTED SPEECH OF INDIVIDUAL CITIZENS OF THE STATE AND NATION."

Appellee's assignment of error is not well-taken. A reading of the decision of the trial court, as quoted above, indicates that the trial court made the finding that appellee, McIntyre, contends is the law, namely that R.C. 3599.09 is overbroad and unconstitutional to the extent that it infringes upon the freedom of speech of persons in the situation of Ms. McIntyre. In effect, finding the statute would otherwise be unconstitutional, the trial court has limited the application and meaning of R.C. 3599.09 so as not to apply to an individual who personally distributes handwritten communication prepared by such individual to others so as to express to such other persons the personal views of the individual handing out such written communication.

This matter arose by the filing of a complaint and affidavit by James Michael Hayfield, which states that he observed McIntyre distributing literature at an evening meeting at Blendon Middle School, said literature relating to a primary

election at which a local ballot issue regarding an operating levy for the Westerville City Schools was on the ballot. He pointed out that the copy of the literature attached to his affidavit does not contain the "* * * name, residence or business address of the person issuing or making the statement, * * * nor * * * the name, residence or business address of the person responsible for the statement * * *." He states that he accosted Ms. McIntyre and told her she was in violation of the election law and that the next day, at a different meeting at Walnut Springs Middle School, Ms. McIntyre passed out identical literature regarding the same election, also, without identification of the person making, or responsible for, the statement therein. The affidavit was filed in March 1989. The complaint was dismissed because Hayfield failed to attend a hearing, although someone stated he was representing Hayfield without further elucidation. Prior to dismissal, however, Hayfield filed an amended affidavit apparently in response to an affidavit filed by McIntyre. Thereafter, an attorney filed a motion to reconsider on behalf of Hayfield which apparently was granted. In any event, eventually a merit hearing was conducted. At the hearing, Hayfield was identified as the Assistant Superintendent of Elementary Education of the Westerville Schools. The evidence also indicated that some of the flyers did have Ms. McIntyre's name and address on them and she stated that she intended for all of them to.

R.C. 3599.09(A) provides, in pertinent part, as follows:

> "No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed * * * to promote the adoption or defeat of any issue, or to influence the voters in any election, * * * unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefor. * * * This section does not apply to the transmittal of personal correspondence that is not reproduced by machine *for general distribution*." (Emphasis added.)

This case involves primarily a constitutional issue, namely the freedom of speech guaranteed by the First Amendment of the United States Constitution and made applicable to the states by the Fourteenth Amendment through the judicial doctrine of incorporation. Appellee, McIntyre, also relies upon Section 11, Article I, Ohio Constitution, which is more express as to the nature of the freedom, stating:

> "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech * * *."

Unlike the First Amendment to the United States Constitution, the Ohio constitutional provision expressly gives to each citizen not only the right to speak but, also, the right both to write and to publish sentiments on any subject. R.C. 3599.09(A) is a limitation upon the right granted by Section 11, Article I, Ohio Constitution, to write and publish sentiments on any subject. The issue then is whether the statute restrains or abridges such right to write and publish sentiments on any subject so as to be in conflict with Section 11, Article I, Ohio Constitution.

The Ohio Supreme Court has recognized the broad scope of the Ohio constitutional protection for the freedom of expression of sentiments and, in *Peltz* v. *South Euclid* (1967), 11 Ohio St. 2d 128, found unconstitutional a municipal ordinance attempting to prohibit the use of political signs in the municipalities, stating expressly that interest in aesthetics and traffic safety does not justify such a prohibition. Such ordinance was found to violate Section 11, Article I, Ohio Constitution, as well as the First and Fourteenth Amendments to

the United States Constitution. A similar conclusion was reached by the Ohio Supreme Court in *Pace* v. *Walton Hills* (1968), 15 Ohio St. 2d 51, finding the prohibition of political signs in residential districts similarly to violate Section 11, Article I, of the Ohio Constitution as well as the United States Constitution. See, however, *State* v. *Babst* (1922), 104 Ohio St. 167, *infra*, discussed in connection with the second assignment of error.

The word "abridge" means to reduce or to diminish and the word "restrain" means to limit, restrict or control.

The commission, arguing that the common pleas court decision is an abuse of discretion, as a predicate for that contention that "* * * a person need not act to mislead or act in a surreptitious manner in order to violate R.C. 3599.09. * * * It is sufficient to establish that the person distributed a document designed to promote the passage or defeat of an issue without the name and address of the person who issues the document appearing thereon in a conspicuous place." Such argument supports the trial court's determination of unconstitutionality, rather than rebuts it. Section 11, Article I, Ohio Constitution, provides that one may be held responsible for an abuse of the freedom of expression and the argument of the commission is to the effect that no abuse is necessary for there to be a restriction upon the freedoms granted by the Ohio Constitution.

The commission now argues that there was a violation of R.C. 3599.09(B) prohibiting false statements. Although the commission, in its brief herein, quotes the last paragraph of R.C. 3599.09(B), it fails to recognize the first paragraph which makes the provision applicable only to use of communication "* * * over the broadcasting facilities of any radio or television station within this state * * *." Obviously, there is no evidence that that occurred in this instance and any finding of the commission of a violation of R.C. 3599.09(B) would be patently unsupported by any evidence.

Accordingly, the first assignment of error is not well-taken.

The second assignment of error raises the constitutional issue which is the primary and controlling issue herein. The

Ohio Supreme Court has held to the effect that R.C. 3599.09(A) is facially constitutional, at least with respect to the Ohio Constitution, in *Babst, supra*, the syllabus of which states:

> "Section 13343-1, General Code, appearing in Part Four, Title I, Chapter 18, entitled 'Offenses Relating to Elections,' in its operation does not restrain or abridge the liberty of speech as guaranteed by Section 11, Article I, Bill or Rights, but is regulatory in nature, and intended to prevent abuse of the right."

Former G.C. 13343-1 read essentially similar to present R.C. 3599.09, except that it requires the name of a "voter," rather than that of a person, who was responsible for the political communication.

Although we are bound by *Babst*, we note several deficiencies to its binding effect: (1) *Babst* was decided prior to the decision of the United States Supreme Court in *Talley* v. *California* (1960), 362 U.S. 60, 80 S.Ct. 536; (2) *Babst* considered only the Ohio Constitution and did not consider the First Amendment to the United States Constitution made applicable to the states by the Fourteenth Amendment; and (3) *Babst* applied a rational basis test for constitutionality rather than the compelling state-interest test which is ordinarily applied with respect to the First Amendment abridgements. Other states have reached different conclusions than that in *Babst*, especially those cases decided subsequent to *Talley*, as is indicated in the annotation "Validity and Construction of State Statute Prohibiting Anonymous Political Advertising." Annotation (1981), 4 A.L.R. 4th 741.

In *Talley, supra*, it was held that a municipal ordinance making it a criminal offense to distribute a handbill unless it contained the names and addresses of the persons who prepared, distributed or sponsored the handbill was void on its face as abridging the freedom of speech and of the press. The statute in question is essentially similar to the ordinance found to be unconstitutional in *Talley*, except that the statute is limited in scope to communications urging the election or

defeat of either a candidate for public office or an issue. The question, therefore, is whether there is sufficient state interest of a different nature so as to justify the statute's infringement upon First Amendment rights.

In *Citizens Against Rent Control* v. *Berkeley* (1981), 454 U.S. 290, 102 S.Ct. 434, the Supreme Court found unconstitutional an ordinance limiting to $250 contributions to committees formed to support or oppose ballot measures submitted to a vote of the people. In the majority opinion, Chief Justice Burger stated at 294:

> "* * * [T]hat regulation of First Amendment rights is always subject to exacting judicial review.
>
> "We begin by recalling that the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process. The 18th-century Committees of Correspondence and the pamphleteers were early examples of this phenomena and the Federalist Papers were perhaps the most significant and lasting example. The tradition of volunteer committees for collective action has manifested itself in myriad community and public activities; in the political process it can focus on a candidate or on a ballot measure. Its value is that by collective effort individuals can make their views known, when, individually, their voices would be faint or lost."

Here, there is no indication of collective action but, instead, attempted written communication by a single person who passed out written statements that she herself prepared.

In holding that a state could not prohibit corporations from making contributions or expenditures advocating views on ballot issues, the United States Supreme Court in *First National Bank of Boston* v. *Bellotti* (1978), 435 U.S. 765, 98 S.Ct. 1407, stated at 1423-1424:

> "* * * Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases

> involving candidates elections * * * simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.' *Kingsley Int'l Pictures Corp.* v. *Regents*, 360 U.S., at 689, 79 S.Ct., at 1365. * * * Moreover, the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate. * * *"

In footnote 32, at page 1424 of the opinion, it is stated:

> "* * * Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected. * * *"

Talley, *supra*, is neither mentioned nor distinguished.

Upon the issue of facial invalidity of R.C. 3599.09, including the overbreadth issue, we are bound by *Babst*, *supra*, only with respect to the Ohio Constitution.

Accordingly, the issue we must determine is whether the common pleas court erred in finding R.C. 3599.09 unconstitutional as applied to appellee's, McIntyre's activities, because it otherwise would be unconstitutional because of overbreadth under the First Amendment of the United States Constitution. Presumably, the appellant, commission, as well as the complainant, school official, would concede that appellee, McIntyre, has a right to voice her views either at the meeting involved, or outside the meeting, without identifying herself by giving her name and address. The question before us is whether appellee, McIntyre, may, likewise, voice such personal views by written communication similarly without

stating her name and address. The views were those of the person handing out the paper who had composed the message on the paper herself. There was no anonymous communication. The person who was asserting the views was there for all to see, even though they might not know her name or address.

The *Babst* court, in effect, found only a rational-basis test to be utilized to determine the constitutionality of the statute under the Ohio Constitution. While this may be debateable, we are bound by *Babst*. On the other hand, for federal constitutional purposes, a compelling state-interest test must be applied with respect to infringements upon the freedom of speech guaranteed by the First Amendment. In light of *Talley* and *Citizens Against Rent Control*, no other conclusion can be reached except that the statute, R.C. 3599.09(A), is unconstitutional because of overbreadth in violation of the First Amendment to the United States Constitution. The dicta in footnote 32 of *First National Bank of Boston, supra*, was a comment directed only at corporate political contributors, not at individuals attempting to express their individual personal views by personally giving to others a written communication they had prepared. As pointed out in the majority opinion, other state courts have reached the same conclusion reached in this dissent. Interestingly, as construed by the majority, that statute would have prohibited distribution of Federalist papers which helped establish our nation and constitution.

In order to preserve its constitutionality, we must construe R.C. 3599.09(A) to apply only to anonymous communications. R.C. 3599.09(A) implictly recognizes this necessary exception by the provision that "* * * [t]his section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution." This was a personal communication being handed out by the person making the communication. Although it was reproduced by machine, such reproduction was not for "general" distribution but, rather, for distribution by the person who was making the communication and giving the message. To be consistent with the freedom of speech provisions of the United States and Ohio Constitutions, we must construe[4] the exception to apply to all written communications, whether or not machine reproduced, that are intended only for personal distribution by the person making the communication and not for general distribution. At least, the evidence herein indicates that all of the papers not bearing the name and address of a person were personally distributed by appellee, McIntyre. Although there is some evidence that her children may have passed out some literature, there is no evidence that the papers passed out by them did not contain appellee's, McIntyre's, name and address. Rather, there is evidence that at least some of the papers did, in fact, contain her name and address.

Nevertheless, to the extent that appellee, McIntyre, personally distributed written communications to persons, R.C. 3599.09(A) is not applicable. We agree with the trial court that, if not so construed, the statute would be unconstitutional as applied to appellee, McIntyre. However, as noted above, the exception sentence is so phrased as to be capable of construction as to exclude from the statute's operation papers and handbills, etc., prepared and personally distributed by the person whose views are expressed, so as to avoid the finding of unconstitutionality. We need not determine whether the statute is overbroad in any other respect since appellee, McIntyre, raises the overbreadth issue only with respect to persons in her situation.

Therefore, even assuming that the trial court erred in finding the statute unconstitutional (rather than construing it not to be applicable) any such error is harmless and nonprejudicial since properly construed to avoid the constitutional conflict, the statute does not apply to appellee's, McIntyre's, activities. Therefore, since the statute does not apply to appellee's, McIntyre's, activities, the trial court properly found

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[4] Although as a strict matter of statutory construction, it is difficult to argue with the analysis of the majority opinion, that is not the issue. Rather, the issue is whether the construction expressed herein is a reasonable limiting construction to avoid the statute's being void for overbreadth.

that the commission's decision that appellee, McIntyre, violated R.C. 3599.09(A) is both contrary to law and unsupported by reliable, probative and substantial evidence. For there reasons, the second assignment of error is not well-taken.

For the forgoing reasons, all the assignments of error should be overruled, and the judgment of the Franklin County Court of Common Pleas should be affirmed.

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

CASE NO. 90CVF 04 2835
JUDGE THOMPSON

MARGARET McINTYRE,
Appellant,

vs.

OHIO ELECTIONS COMMISSION,
Appellee.

DECISION
Rendered this ____ day of September 1990

THOMPSON, J.

This matter comes before the Court upon appeal by Margaret McIntyre from a Decision of the Ohio Elections Commission (Commission) dated March 30, 1990. The Commission found that Ms. McIntyre violated R.C. Section 3599.09. That section provides in part:

> (A) No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed . . . to promote the adoption or defeat of any issue, or to influence the voters in any election, . . . magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other non-periodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman,

treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefore.

* * *

No person shall use or cause to be used a false, fictitious, or fraudulent name or address in the making or issuing of a publication or communication included within the provisions of this section."

The subject of the violation found by the Commission was a flyer passed out by Ms. McIntyre which expressed her negative views with respect to a Westerville school tax levy. It was titled "CONCERNED PARENTS AND TAXPAYERS" and for the sake of this Decision it will be assumed that some of those flyers were distributed with neither Ms. McIntyre's name or address upon them.

Two cases have dealt with Section 3599. *In re Pirko* (1988), 44 O. App.3d 3, addressed whether a pamphlet was a false statement. The court held that despite being misleading it would not be considered false. The court further held that the statement was to be strictly scrutinized with respect to any possible penal violation that would be assessed by the State. The case of *Pestrak* v. *The Ohio Elections Commission* (1988), 677 F. Supp. 543 (S.D.), went further in declaring Section 3599.09 invalid as a prior restraint of free speech as protected under the First Amendment.

It is the conclusion of this Court that the reasoning in *Pestrak* is equally applicable in this case. While it may be that Section 3599.09 could be considered unconstitutional on its face, this Court has a duty to construe the statute constitutional, if possible. *Bishop* v. *Hybud* (1988), 76 O. App.3d 55. The Court is cognizant of the need to protect the voting process from scandalous, libelous, or malicious attempts to degrade its integrity. The freedom to voice one's opinion either for or against an issue or a candidate must however be protected. The Court finds that the statute, as applied to Ms. McIntyre's activity, is unconstitutional. The record does not

reflect any attempt by Ms. McIntyre to mislead the public nor act in a surreptitious manner. With due regard to the electoral process, the statute extends too far in requiring Ms. McIntyre to have her name, residence, or further disclaimers upon the flyer.

There is further no support for the Commission's finding, if there was such, that Ms. McIntyre used a false or fictitious or fraudulent name with respect to "CONCERNED PARENTS AND TAXPAYERS".

The Court finds that the Commission's Decision as to a violation of R.C. Section 3599.09 by Ms. McIntyre is not supported by the Record and is in fact unconstitutionally applied. The Decision of the Commission is REVERSED.

Counsel for Appellant shall prepare a judgment entry accordingly.

/s/ TOMMY L. THOMPSON, JUDGE

cc:

GEORGE Q. VAILE, Esq.
Counsel for Appellant

CATHERINE M. COLA, Esq., AAG.
Counsel for Appellee

OHIO REVISED CODE

§ 3599.09 Political communications must be identified; penalty.

(A) No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other non-periodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefore. The disclaimer "paid political advertisement" is not sufficient to meet the requirements of this division. When such publication is issued by the regularly constituted central or executive committee of a political party, organized as provided in Chapter 3517. of the Revised Code, it shall be sufficiently identified if it bears the name of the committee and its chairman or treasurer. No person, firm, or corporation shall print or reproduce any notice, placard, dodger, advertisement, sample ballot, or any other form of publication in violation of this section. This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution.

The secretary of state may, by rule, exempt, from the requirements of this division, printed matter and certain other kinds of printed communications such as campaign buttons, balloons, pencils, or like items, the size or nature of which

makes it unreasonable to add an identification or disclaimer. The disclaimer or identification, when paid for by a campaign committee, shall be identified by the words "paid for by" followed by the name and address of the campaign committee and the appropriate officer of the committee, identified by name and title.

[Leaflet Distributed at Blendon Middle School]

VOTE NO

ISSUE 19 SCHOOL TAX LEVY

Last election Westerville Schools, asked us to vote yes for new buildings and expansions programs. We gave them what they asked. We knew there was crowded conditions and new growth in the district.

Now we find out there is a 4 million dollar deficit - WHY?

We are told the 3 middle schools must be split because of over-crowding, and yet we are told 3 schools are being closed - WHY?

A magnet school is not a full operating school, but a specials school.

Residents were asked to work on a 20 member commission to help formulate the new boundaries For 4 weeks they worked long and hard and came up with a very workable plan. Their plan was totally disregarded - WHY?

WASTE of tax payers dollars must be stopped. Our children's education and welfare must come first. WASTE CAN NO LONGER BE TOLERATED.

PLEASE VOTE NO

ISSUE 19

THANK YOU,

CONCERNED PARENTS
AND
TAX PAYERS

[Leaflet Distributed at Walnut Springs Meeting]

VOTE NO

ISSUE 19 SCHOOL TAX LEVY

Last election Westerville Schools, asked us to vote yes for new buildings and expansions programs. We gave them what they asked. We knew there was crowded conditions and new growth in the district.

Now we find out there is a 4 million dollar deficit - WHY?

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PLEASE VOTE NO

ISSUE 19

THANK YOU,

CONCERNED PARENTS
AND
TAX PAYERS

NOT PAID FOR BY PUBLIC FUNDS

[Finding of Ohio Elections Commission]

Ohio Elections Commission
State Office Tower, 14th Floor
Columbus, Ohio 43266-0418
(614) 466-2585

March 30, 1990

CASE NO. 89A-9
Hayfield v. McIntyre

TO: Margaret McIntyre

Please be advised that the Ohio Elections Commission adopted the following finding(s) in the above-referenced case at its meeting of March 19, 1990:

That there is no violation of Ohio's Revised Code section(s) 3517.10(D) and 3517.13(E).

That there is a violation of Ohio Revised Code section 3599.09 and therefore, the Commission imposes upon Margaret McIntyre a fine of $100.

The above fines must be paid no later than thirty days after the date of this letter. Payment should be made payable to The Ohio Elections Commission at the above address.

If you have any questions, please feel free to contact me.

Very truly yours,

Roger F. Deal
Commission Counsel

RFD:ds

cc: Jennifer L. Brunner

ooznt

(2)

No. 93-986

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

MARGARET McINTYRE,

Petitioner,

v.

OHIO ELECTIONS COMMISSION,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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ATTORNEY GENERAL OF OHIO

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QUESTION PRESENTED

Is Ohio Revised Code §3599.09(A), an election statute that has been construed by the Ohio Supreme Court to have the salutary purpose of deterring fraud, false advertising and libel, unconstitutional because it can be applied to anonymous campaign literature?

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TABLE OF AUTHORITIES

REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT A PROPER VEHICLE FOR TESTING THE CONSTITUTIONALITY OF OHIO REVISED CODE §3599.09(A).

The success of McIntyre's petition for certiorari depends on her arguments that 1) this Court's decision in *Talley v. California*, 362 U.S. 60 (1960), prohibits *any* proscription on anonymous speech, and 2) that "[t]he Ohio Supreme Court's decision in this case in refusing to follow *Talley v. California*, [362 U.S. 60 (1960)], is generating a serious conflict of legal authority." Petition for Certiorari at 20. Neither contention, however, is correct. Consequently, the petition for certiorari should be denied.

A. The Decision Below Is Not Inconsistent With This Court's Decision In *Talley v. California*.

In *Talley*, the Court invalidated legislation that "apparently had as its only purpose the identification of the author of . . . handbills." *McIntyre v. Ohio Elections Commission*, 67 Ohio St. 3d 391, 394, 618 N.E.2d 152, 154 (1993). The *Talley* Court had no occasion to "pass on the validity of an ordinance limited to preventing [fraud, false advertising and libel]." *Talley*, 362 U.S. at 64.

In the case below, the Ohio Supreme Court established as the purpose of Ohio Rev. Code §3599.09(A) the identification of persons "responsible for fraud, false advertising and libel." *McIntyre* 67 Ohio St. 3d at 394, 618 N.E.2d at 154. Thus, rather than conflicting with *Talley*, the decision below addresses a subject *never* considered by the Court in *Talley*. As a result, there is no friction between *Talley* and the decision below.

B. There Is No Conflict Between The Decision Below And Cases Cited In The Petition For Certiorari.

McIntyre cites several cases that she contends are in conflict with the decision below. *See Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987); *Illinois v. White*, 116 Ill. 2d 171, 506 N.E.2d 1284 (1987); *Schuster v. Imperial County Municipal Court*, 109 Cal. App. 3d 887, 167 Cal. Rptr. 447 (1980), *cert. denied*, 450 U.S. 1042 (1981); *State of North Dakota v. North Dakota Education Association*, 262 N.W.2d 731 (1978); *State of Louisiana v.Fulton*, 337 So. 2d 866 (1976); *Commonwealth of Massachusetts v. Dennis*, 368 Mass. 92, 329 N.E.2d 706 (1975); *State of New York v. Duryea*, 76 Misc. 2d 948, 351 N.Y.S.2d 978 (1974); *State of Idaho v. Barney*, 92 Idaho 581, 448 P.2d 195 (1968). But a review of these cases reveals that each dealt with "a legislative prohibition on *all* anonymous campaign literature," *Schuster*, 109 Cal. App. at 899, 167 Cal. Rptr. at 453 (emphasis added), regardless of whether fraud was involved. Because Ohio Rev. Code §3599.09(A), as interpreted by the Ohio Supreme Court, the final arbiter of the meaning of Ohio law, is limited to prohibiting "fraud, false advertising and libel," *McIntyre*, 67 Ohio St. 3d at 394, 618 N.E.2d at 154, there is no conflict between these cases, at least in regard to McIntyre's facial challenge to Ohio Rev. Code §3599.09(A).

C. It Is Unclear From The Decision Below Whether A Finding Of Fraud Was Made By The Ohio Supreme Court.

The only question remaining before this Court, therefore, is whether Ohio Rev. Code §3599.09(A) was applied constitutionally to McIntyre's conduct. And, quite frankly, even if this Court chooses to accept a case that presents a factual, rather than a legal question, it is unclear from the decision below whether or not a finding of fraud was a predicate to holding McIntyre responsible for violating Ohio Rev. Code §3599.09(A).

Pursuant to the transcript from the administrative hearing before the Ohio Elections Commission ("OEC"), the following exchange occurred between McIntyre and Michael Igoe, a member of the OEC:

> McIntyre: . . . I was working as an individual citizen, not a committee, not as a group; therefore, I didn't need to file anything.
>
> Igoe: Except you didn't identify yourself as an individual; you identified yourself as a group.

This dialogue demonstrates that there was evidence before the OEC to support the conclusion that McIntyre, by identifying as the circulators of her literature "Concerned Parents and Taxpayers," attempted to mislead voters as to the source of the information. Unfortunately, the order issued by the OEC finding that McIntyre violated Ohio Rev. Code §3599.09(A) is silent as to the basis for the OEC's finding.

Both the OEC transcript and order were part of the administrative record before the Ohio Supreme Court when it considered McIntyre's case. The Ohio Supreme Court, however, makes no reference in its opinion to the OEC transcript.

Of course, it cannot be assumed that the court below was unaware of the exchange between McIntyre and Commissioner Igoe. To the contrary, it should be presumed that the Ohio Supreme Court was familiar with the entire record before it. Nevertheless, based on the language of the decision below, it is unclear whether the Ohio Supreme Court considered this evidence. And without a clear statement demonstrating that the court below determined McIntyre violated Ohio Rev. Code §3599.09(A) irrespective of a finding of fraud, this Court should not expend any of its limited time to hear a case that even under McIntyre's interpretation of the law might have been correctly decided. This case, therefore, is not an appropriate vehicle for deciding the issues presented and McIntyre's petition for a writ of certiorari should be denied.

II. OHIO REVISED CODE §3599.09(A) DOES NOT VIOLATE THE RIGHT TO FREEDOM OF SPEECH AND EXPRESSION GUARANTEED BY THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Ohio Revised Code §3599.09(A) Is Constitutional Under The Balancing Test For State Election Laws Established By This Court In *Anderson v. Celebrezze* And *Burdick v. Takushi*.

As noted earlier, *Talley v. California* does not control the outcome of this case. Consequently, this Court must look elsewhere in order to resolve the controversy between the parties.

The State of Ohio, like all states, must regulate elections in order to promote democracy and to preserve integrity in the electoral process. "As a practical matter, there must be a substantial regulation of elections if they are going to be fair and honest and if some order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Ohio Rev. Code §3599.09(A) is an election regulation statute. McIntyre's contention that Ohio Rev. Code §3599.09(A) is not an election regulation statute is refuted both by the inclusion of Ohio Rev. Code §3599.09(A) in the portion of the Ohio Revised Code devoted to elections, and the close relationship between Ohio Rev. Code §3599.09(A) and two other statutes, Ohio Rev. Code §3599.091(B)(2)-(10) and Ohio Rev. Code §3599.092(B)(2), which McIntyre concedes are election regulations.

Recently, in *Burdick v. Takushi*, 112 S.Ct. 2059 (1992), the Court stated that to subject every election statute to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest "would tie the hands of states seeking to assure that elections are operated equitably and efficiently." 112 S.Ct. at 2063. Thus,

"[c]onstitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any 'litmus-paper test' that will separate valid from invalid restrictions". *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (quoting *Storer*, 415 U.S. at 730)

Rather than applying a rigid test for evaluating challenges to state election laws,

> A Court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Id. Celebrezze*, 460 U.S. at 789.
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. ___, ___, 112 S.Ct. 695, 705 (1992). But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.

112 S.Ct. at 2063-4 (citations omitted). Under *Anderson v. Celebrezze* and *Burdick v. Takushi*, therefore, this Court must first assess the "character and magnitude of the asserted injury" Ohio Rev. Code §3599.09(A) allegedly imposes on

those who are responsible for the distribution of publications advocating the defeat or passage of ballot issues.

1. Ohio Rev. Code §3599.09(A) Does Not Impose A Severe Burden On First Amendment Rights.

Although Ohio Rev. Code §3599.09(A), like all election regulations, has an impact on First Amendment rights, the statute does not unconstitutionally restrict the opportunities for free expression. Distributing political literature promoting the passage or defeat of an issue is not the only avenue for free expression. Ohio Rev. Code §3599.09(A) does not prevent persons from engaging in door-to-door campaigning, making speeches, participating in debates, or appearing on public access television.

More importantly, there is nothing in the record to indicate that the disclaimer requirement does in fact substantially inhibit political expression. Indeed, political activity in Ohio is vigorous. Few seem deterred from this activity by concern that they must take responsibility for their actions and statements.

In particular, McIntyre fully enjoyed her freedom of speech. On at least two separate occasions she distributed school levy literature. She was free to do so and was not prohibited from attending the school meetings to make the distribution or to vocalize her position both inside and outside the school meetings. Thus, McIntyre was not punished because of the substance or content of her expression. For these reasons, McIntyre's contention that she was punished for the communication of a classic political viewpoint is false.

Given these facts, it must be concluded that Ohio Rev. Code §3599.09(A) did not severely restrict McIntyre's First Amendment rights. Any burden imposed on those rights by the statute is marginal. Furthermore, the statute's limited burden is nondiscriminatory and politically neutral because it neither prohibits the communication of ideas nor attempts to regulate the content of expression.

2. The State Of Ohio Has Appropriate Interests In Deterring Fraud, False Advertising and Libel In Elections, And In Promoting An Informed Electorate.

The next step in the *Anderson* and *Burdick* analysis is to evaluate the interests put forward by the state as justifications for the burden imposed by the statute. According to the Ohio Supreme Court, the purpose of Ohio Rev. Code §3599.09(A) is to prevent "fraud, false advertising and libel." 67 Ohio St. 3d at 394. This purpose is particularly laudable in this age of negative, attack-style politics.

Moreover, in *First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765 (1978), the Court identified another legitimate state purpose underlying statutes such Ohio Rev. Code §3599.09(A): "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and the credibility of the advocate." *Bellotti,* 435 U.S. at 791-92. In footnote 32 of its opinion, the Court stated that in the case of corporate advertising, identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected. *Id.* The Court's rationale for mandatory disclosure in the case of corporate advertising was that, unlike some methods of participation in political campaigns, corporate advertising is likely to be highly visible. *Id.*

There is no question that corporations have the resources to be highly influential in the political process. Nevertheless, it is simply incorrect to assume that only corporations or political parties are visible enough in the political process to be subject to mandatory disclosure requirements. Individuals or groups of citizens conducting their own campaigns by designing literature and distributing it in a neighborhood or at public assemblies also can have a major impact on an election. The disclosure requirement of R.C. §3599.09(A) ensures that those responsible for the distribution of campaign literature are held accountable to

the public in order to encourage responsible campaigning. It also ensures that voters will have sufficient information to make an informed choice.

Preventing fraud in elections and facilitating the public's ability to consider the credibility of sources, the two legitimate state interests advanced by Ohio Rev. Code §3599.09(A), outweigh the limited burden imposed on political activity by Ohio Rev. Code §3599.09(A). The prohibition of Ohio Rev. Code §3599.09(A), when considered as part of the electoral process, therefore, does not impose an unconstitutional burden upon the First Amendment rights of individuals such as McIntyre.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

LEE FISHER
ATTORNEY GENERAL OF OHIO

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(614) 466-2872

January 1994

(3)

No. 93-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARGARET MCINTYRE,

Petitioner,

—v.—

OHIO ELECTIONS COMMISSION,

Respondent.

ON WRIT OF *CERTIORARI* TO THE SUPREME COURT OF OHIO

JOINT APPENDIX

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(614) 466-2872

Counsel for Respondent

PETITION FOR *CERTIORARI* FILED DECEMBER 16, 1993
CERTIORARI GRANTED FEBRUARY 22, 1994

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RELEVANT EXCERPTS OF OHIO COURT DOCKET ENTRIES

RELEVANT EXCERPTS OF CIVIL CASE DISPLAY FRANKLIN COUNTY COURT OF COMMON PLEAS

[ENTRY NUMBER]	
1: 4/16/90	NOTICE OF APPEAL
8: 4/25/90	CERTIFICATION OF RECORD OF ADM PROCEEDINGS
20: 10/02/90	JUDGMENT ENTRY -- JDG.THOMPSON,TERMINATED
21: 10/23/90	NOTICE OF APPEAL FILED BY ATTY. COLA 90AP-1221
22: 10/23/90	COPY OF JUDGMENT ENTRY FILED

RELEVANT EXCERPTS OF COURT OF APPEALS DOCKET AND JOURNAL ENTRIES
Appeal No. 90 AP 1221

[ENTRY NUMBER]			
1	1990	OCT 23	NOTICE OF APPEAL WITH DOCKET SHEET FILED
10	1990	DEC 20	BRIEF OF APPELLANT (OHIO ELECTIONS)
12	1991	JAN 09	BRIEF OF APPELLEE (MCINTYRE)
13	1991	JAN 22	REPLY BRIEF OF APPELLANT (OHIO ELEC)
16	1992	APR 07	OPINION RENDERED (20 PGS)
17	1992	APR 10	JUDGMENT OF THE

18	1992 MAY 11	COURT OF COMMON PLIAS IS REVERSED AND REMENDED AS PER ENTRY C/A DR, CIVIL, HAYES, VAILE, DEVINE, COLA APPELLEE (MCINTYRE) NOTICE OF APPEAL TO THE SUPREME COURT

RELEVANT EXCERPTS OF THE SUPREME COURT OF OHIO DOCKET EVENT LISTING

ACTION DATE	ACTION
06-10-92	NOTICE OF APPEAL FILD FILED BY MARGARET MCINTYRE MEMO IN SUPP OF JURIS FILD
09-30-92	UPON CONSIDERATION OF JURIS QUESTION
DECISION:	09-30-92 ALLOWED
09-22-93	UPON CONSIDERATION OF THE MERITS
DECISION:	09-22-93 AFFIRMED
10-05-93	CERT COPY OF ENTRY SENT TO CLERK MANDATE ISSUED
02-28-94	ORDER FROM US SUPREME CT FILD WRIT OF CERTIORARI GRANTED

BEFORE THE OHIO ELECTIONS COMMISSION
STATE OF OHIO

Affidavit of J. Michael Hayfield

I, J. Michael Hayfield, depose and state as follows:

1. My name is J. Michael Hayfield.

2. I reside at 52 0 Michael Avenue, Westerville, Ohio 43081.

3. On or about April 27, 1988, I observed Margaret McIntyre, whose address is 5278 Broadview Road, Columbus, OH 43230, distributing literature at an evening meeting at Blendon Middle School.

4. Exhibit A, attached hereto and incorporated herein, is a copy of the literature I observed her distributing at that time and location. Said literature relates to the May 3, 1988 primary election at which a local ballot issue regarding an operating levy for the Westerville City Schools was on the ballot.

5. Exhibit A does not contain the name, residence or business address of the person issuing or making the statement, who appears to be Margaret McIntyre, nor does it contain the name, residence or business address of the person responsible for the statement if it is not Margaret McIntyre.

6. I believe that Margaret McIntyre has violated section 3599.09 of the Revised Code in failing to identify Exhibit A.

7. On or about April 27, 1988, after examining a copy of Exhibit A which Margaret McIntyre was distributing, I informed Margaret McIntyre at the time she was distributing Exhibit A, that she was in violation of election law for failing to identify the statements contained within Exhibit A.

9. On or about April 28, 1988, Margaret McIntyre dis-

tributed campaign literature, attached hereto and incorporated herein as Exhibit B, at Walnut Springs Middle School.

10. Subsequent to this time, I obtained a copy of Exhibit B, relating to the May 3, 1988 primary election at which a local ballot issue regarding an operating levy for the Westerville City Schools was on the ballot, and I examined its contents.

11. Exhibit B does not contain the name, residence or business address of the person issuing or making the statement, who appears to be Margaret McIntyre, nor does it contain the name, residence or business address of the person responsible for the statement if it is not Margaret McIntyre.

12. Exhibit B names what may be an organization called, "Concerned Parents and Tax Payers".

13. Exhibit B does not contain the name, residence or business address of the chairman, treasurer, or secretary of the organization that appears to be issuing the statement, Concerned Parents and Tax Payers.

14. I believe that Margaret McIntyre has violated section 3599.09 of the Revised Code in failing to identify Exhibit B.

15. If Concerned Parents and Tax Payers is a political action committee, I believe that Margaret McIntyre has violated section 3517.13(E) of the Revised Code in failing to file a statement required under section section 3517.10 of the Revised Code, with the penalty for the same being a fine of $100 per day for each day of violation.

16. I believe that Margaret McIntyre knowingly violated either section 3517.13 or 3599.09 of the Revised Code, based on her continued publishing and distribution of the statement which I informed her did not meet elec-

tion requirements.

17. I hereby file this affidavit with the Ohio Elections Commission pursuant to sections 3517.15, and 3599.09 of the Ohio Revised Code, declaring that the statements made herein are based on personal knowledge, observation and examination of Exhibits A and B.

Affiant further sayeth naught.

J. Michael Hayfield

[Jurat Omitted in Printing]

EXHIBIT A

VOTE NO

ISSUE 19 SCHOOL TAX LEVY

Last election Westerville Schools, asked us to vote yes for new buildings and expansions programs. We gave them what they asked. We knew there was crowded conditions and new growth in the district.

Now we find out there is a 4 million dollar deficit - WHY?

We are told the 3 middle schools must be split because of over-crowding, and yet we are told 3 schools are being closed - WHY?

A magnet school is not a full operating school, but a specials school.

Residents were asked to work on a 20 member commission to help formulate the new boundaries For 4 weeks they worked long and hard and came up with a very workable plan. Their plan was totally disregarded - WHY?_

WASTE of tax payers dollars must be stopped. Our children's education and welfare must come first. **WASTE CAN NO LONGER BE TOLERATED.**

PLEASE VOTE NO

ISSUE 19

THANK YOU,

CONCERNED PARENTS
AND
TAX PAYERS

[DISTRIBUTED AT THE BLENDON MEETING]

EXHIBIT B

VOTE NO

ISSUE 19 SCHOOL TAX LEVY

Last election Westerville Schools, asked us to vote yes for new buildings and expansions programs. We gave them what they asked. We knew there was crowded conditions and new growth in the district.

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A magnet school is not a full operating school, but a specials school.

Residents were asked to work on a 20 member commission to help formulate the new boundaries For 4 weeks they worked long and hard and came up with a very workable plan. Their plan was totally disregarded - WHY?

WASTE of tax payers dollars must be stopped. Our children's education and welfare must come first. **WASTE CAN NO LONGER BE TOLERATED.**

PLEASE VOTE NO

ISSUE 19

THANK YOU,

CONCERNED PARENTS
AND
TAX PAYERS

Not Paid For By Public Funds

[DISTRIBUTED AT WALNUT SPRINGS]

Ohio Elections Commission
State Office Tower, 14th Floor
Columbus, Ohio 43266-0418
(614) 466-2585

April 6, 1989

Case No. 89A-9

TO: Michael Hayfield

The Ohio Elections Commission has received your complaint alleging one or more violations of Ohio Revised Code section(s) 3599.09 (incomplete disclaimer on literature, 3517.10(D) (Failure to file Designation of Treasurer) and 3517.13(E) (Failure to file PAC report). A copy of the relevant statutes and the Commission's Rules of Procedure are enclosed.

The first stage of a Commission investigation is known as the preliminary review. The Commission has scheduled a preliminary review of your case for Monday, 8:30 a.m., May 15, 1989, in the Annex Hearing Room on the third floor of the Ohio Statehouse Annex which is located at Broad and Third Streets, Columbus, Ohio. The person(s) against whom the complaint was filed have the right to file a written response with the Commission prior to the preliminary review disputing the alleged violation(s) or explaining the reason or reasons for any violation(s).

At the preliminary review, the Commission will review the documents previously submitted by you and the respondents. After reviewing the documents, the Commission may do one of the following: It may find that there has been no violation; it may find there has been a violation; or it may set the matter for a hearing at a later date if it desires to receive testimony. If the Commission finds a violation, it must do one of the following: Impose a fine and not to refer the matter for prosecu-

tion. Following the preliminary review, the Commission will mail you a letter advising the action it took.

You are welcome to attend and observe the preliminary review. However, you may not make any statements or present any evidence at that time.

If, after reading the enclosed materials, you have any questions, please feel free to telephone me at (614) 466-2585. Whenever you telephone, correspond or file material with the Commission, please be certain to refer to the case number listed above.

Sincerely,

Donald J. McTigue
Commission Counsel

dlc

ENCLOSURES
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Ohio Elections Commission
State Office Tower, 14th Floor
Columbus, Ohio 43266-0418
(614) 466-2585

April 6, 1989

Case No. 89A-9

TO: Margaret McIntyre

The Ohio Elections Commission has received a complaint alleging one or more violations by you of Ohio Revised Code section(s) 3599.09 (Incomplete disclaimer on literature, 3517.10(D) (Failure to file a Designation of Treasurer) and 3517.13(E) (Failure to file PAC report). It is the duty of the Commission to investigate such complaints. A copy of the complaint, the relevant statutes, and the Commission's Rules of Procedure is enclosed.

The first stage of a Commission investigation is known as the preliminary review. The Commission has scheduled a preliminary review of your case for Monday, 8:30 a.m., May 15, 1989, in the Annex Hearing Room on the third floor of the Ohio Statehouse Annex which is located at Broad and Third Streets, Columbus, Ohio.

You have the right to file a written response with the Commission disputing the alleged violation(s) or explaining the reasons for any violation(s). Your response must be *notarized* and must be *received* by the Commission at the above address no later than twenty-one (21) days after the date of this letter. In addition to your own notarized statement, you may submit exhibits and notarized statements of other persons that substantiate the facts in your response. Whenever you correspond or file material with the Commission, be certain to refer to the case number listed above.

At the preliminary review, the Commission will re-

view the documents submitted by the complaint(s) and any documents submitted by you. After reviewing the documents, the Commission may do one of the following: It may find that there has been no violation; it may find that there has been a violation; or, it may set the matter for a hearing at a later date if it desires to receive testimony. If the Commission finds a violation, it must do one of the following: Impose a fine in accordance with Rule 111:1-1-10 of the Commission; refer the matter to a local prosecutor; or, determine that good cause has been shown for the Commission not to impose a fine and not to refer the matter for prosecution. Following the preliminary review, the Commission will send you a letter advising what action it has taken.

You are welcome to attend and observe the preliminary review. However, you may not make any statements or present any evidence at that time. As stated above, *notarized* statements and other evidence must be submitted no later than 21 days after the date of this letter.

If, after reading the enclosed materials, you have any questions, please feel free to telephone me at (614) 466-2585.

Sincerely,

Donald J. McTigue
Commission Counsel

dlc
ENCLOSURES
0 0 1 7 E

CASE NO. *89A-9*

EXHIBIT: *1*

April 15, 1989.

Donald J. McTigue
Commossion Counsel
Ohio Office Tower, 14th. Floor
Columbus, Ohio 43266-0418

Re; Case No. 89A-9

Dear Mr. McTigue:

This letter is in response to the complaint filed by J. Michael Hayfield. The literature in question and presented as Exhibit A and B were distributed in error. Due to some necessary changes, a few copies were run through with incomplete information. We thought all of those had been destroyed but apparently a few were missed and mixed in with the good fliers.

Enclosed within is a letter from the printer and copies of the originals. It was my belief that all fliers distributed contained the same wording as the original. At no time was there any intent to hide my identity or to issue any false statements. At no time did I imply that I represented any group or organization. I was merely expressing my concerns and those of others that I had talked with in our school district.

Therefore, being a party of one, I am not required by the State of Ohio or the County of Franklin to register as a political action committee.

Sincerely,

Margaret McIntyre
5278 Broadview Road
Columbus, Ohio 43230

[Jurat Omitted in Printing]

INSTANT COPY

599 S. STATE ST., WESTERVILLE, OHIO 43081
TELEPHONE 882-8520

TO WHOM IT MAY CONCERN:

I WAS THE PRINTER THAT PRINTED MARGE McINTYRE'S PRINTED MATERIAL. THE DOCUMENTS THAT WERE SHOWN TO ME COULD HAVE BEEN VERY EASILY ALTERED TO SUIT THE PERSON WHO IS INSISTING ON LEGAL ACTION AGAINST HER. WITH TODAY'S HIGH TECH COPIERS ANYTHING IS POSSIBLE. I KNOW HER TO BE A LAW ABIDING CONCERNED TAX PAYER THAT WOULD NOT INTENTIONALLY VIOLATE ANY THAT THAT SHE WOULD BE AWARE OF. THIS WHOLE THING SMELLS LIKE SOUR GRAPES TO ME.

SINCERELY,

JOSEPH SUROVIEC (OWNER)

[Jurat Omitted in Printing]

CASE NO: *89A-9*

EXHIBIT: *2*

BEFORE THE OHIO ELECTIONS COMMISSION
STATE OF OHIO

J. Michael Hayfield	(	Case No. 89A-9
vs.	(	
Margaret McIntyre	(	

Amended Affidavit of J. Michael Hayfield

I, J. Michael Hayfield, depose and state as follows:

1. My name is J. Michael Hayfield.

2. I reside at 520 Michael Avenue, Westerville, Ohio 43081.

3. On or about April 27, 1988, I observed Margaret McIntyre, whose address is 5278 Broadview Road, Columbus, OH 43230, distributing literature at an evening meeting at Blendon Middle School.

4. Exhibit A, attached hereto and incorporated herein, is a copy of the literature I observed her distributing at that time and location. Said literature relates to the May 3, 1988 primary election at which a local ballot issue regarding an operating levy for the Westerville City Schools was on the ballot.

5. Exhibit A does not contain the name, residence or business address of the person issuing or making the statement, who appears to be Margaret McIntyre, nor does it contain the name, residence or business address of the person responsible for the statement if it is not Margaret McIntyre.

6. I believe that Margaret McIntyre has violated section 3599.09 of the Revised Code in failing to identify Exhibit A.

7. On or about April 27, 1988, after examining a copy

of Exhibit A which Margaret McIntyre was distributing, I informed Margaret McIntyre at the time she was distributing Exhibit A, that she was in violation of election law for failing to identify the statements contained within Exhibit A.

8. At the time I so informed her, Margaret McIntyre stated to me that she did not need to identify the material.

9. I observed at the meeting on or about April 27, 1988, that Margaret McIntyre proceeded to widely distribute copies of Exhibit A, exactly as it appears, to nearly every person who entered the building or room for the meeting. She did not enter the meeting room but remained outside the doorway to the room, continuing to distribute copies of Exhibit A exactly as it appears as attached to this affidavit.

10. At the meeting April 27, 1989, I observed and listened to the superintendent of Westerville City Schools, Ernest Husarik, as part of his presentation, discuss the statements appearing in Exhibit A distributed at the meeting by Margaret McIntyre.

11. The copies of Exhibit A were widely distributed. I believe that any other version of Exhibit A that has been presented by Margaret McIntyre to the Ohio Elections Commission has been altered and was not the copy distributed on April 27, 1989.

12. On or about April 28, 1988, Margaret McIntyre distributed campaign literature, attached hereto and incorporated herein as Exhibit B, at Walnut Springs Middle School.

13. Subsequent to this time, I obtained a copy of Exhibit B, relating to the May 3, 1988 primary election at which a local ballot issue regarding an operating levy for the Westerville City Schools was on the ballot, and I examined its contents.

14. Exhibit B does not contain the name, residence or

business address of the person issuing or making the statement, who appears to be Margaret McIntyre, nor does it contain the name, residence or business address of the person responsible for the statement if it is not Margaret McIntyre.

15. Exhibit B names what may be an organization called, "Concerned Parents and Tax Payers".

16. Exhibit B does not contain the name, residence or business address of the chairman, treasurer, or secretary of the organization that appears to be issuing the statement, Concerned Parents and Tax Payers.

17. I believe that Margaret McIntyre has violated section 3599.09 of the Revised Code in failing to identify Exhibit B.

18. If Concerned Parents and Tax Payers is a political action committee, I believe that Margaret McIntyre has violated section 3517.13(E) of the Revised Code in failing to file a statement required under section section 3517.10 of the Revised Code, with the penalty for the same being a fine of $100 per day for each day of violation.

19. I believe that Margaret McIntyre knowingly violated either section 3517.13 or 3599.09 of the Revised Code, based on her continued publishing and distribution of the statement which I informed her did not meet election requirements.

20. I hereby file this affidavit with the Ohio Elections Commission pursuant to sections 3517.15, and 3599.09 of the Ohio Revised Code, declaring that the statements made herein are based on personal knowledge, observation and examination of Exhibits A and B.

Affiant further sayeth naught.

_____

J. Michael Hayfield

[Jurat Omitted in Printing]

BEFORE THE OHIO ELECTIONS COMMISSION

- - -

ITEM NO. 5, CASE: HAYFIELD VS. MCINTYRE
CASE NO. 89A-9

- - -

EXCERPT OF PROCEEDINGS

BEFORE THE OHIO ELECTIONS COMMISSION, COMMISSIONER LARRY JAMES, JUDITH D. MOSS, DOROTHY WASHINGTON, MICHAEL IGOE, MEROM BRACHMAN PRESIDING, TAKEN BEFORE ME, SHARON L. REIL, REGISTERED PROFESSIONAL REPORTER AND NOTARY PUBLIC IN AND FOR THE STATE OF OHIO, AT THE OHIO STATEHOUSE ANNEX, BROAD AND THIRD STREETS, COLUMBUS, OHIO, ON MONDAY, JULY 17, 1989, AT 8:48, A.M.

- - -

PROFESSIONAL REPORTERS, INC.
145 NORTH HIGH STREET
COLUMBUS, OHIO 43215
PHONE 614/464-0675

APPEARANCES:
COMMISSIONER LARRY JAMES
JUDITH MOSS
DOROTHY WASHINGTON
MICHAEL IGOE
MEROM BRACHMAN
ALSO PRESENT: DON MCTIGUE
DAVE CLOUSTON

• • • • •

CHAIRMAN JAMES: ON THE NEXT ITEM, WE HAVE MICHAEL HAYFIELD VERSUS MARGARET MCINTYRE; INCOMPLETE DISCLAIMER ON LITERATURE, FAILURE TO DESIGNATE TREASURER PURSUANT TO SECTION 3517.10 (D), BALLOT ISSUE, WESTERVILLE SCHOOL LEVY ISSUE 45, ELECTION 1988 GENERAL.

WE JUST HAD AN 89A-8 REGARDING THE SAME RESPONDENT. IS MR. HAYFIELD HERE?

MR. BRUNNER: I AM REPRESENTING HIM.

CHAIRMAN JAMES: IF MR. HAYFIELD IS NOT HERE, WHAT'S THE PLEASURE OF THE COMMISSION?

MS. MOSS: IS THIS SET FOR HEARING?

MR. MCTIGUE: IT IS SET FOR HEARING. MR. HAYFIELD WAS SENT CERTIFIED MAIL NOTICE OF THE HEARING TODAY. WE HAVE A RETURNED RECEIPT SIGNED BY A KIM HAYFIELD AT MICHAEL HAYFIELD'S ADDRESS.

CHAIRMAN JAMES: IS THERE A MOTION TO DISMISS AND FAILURE TO PROSECUTE?

MS. MOSS: SO MOVE.

MR. BRACHMAN: SECOND

CHAIRMAN JAMES: ALL THOSE IN FAVOR?

MS. MOSS: AYE.

MS. WASHINGTON: AYE.

MR. IGOE: AYE.

CHAIRMAN JAMES: CARRIES.

• • • •

JENNIFER L. BRUNNER
ATTORNEY AND COUNSELLOR AT LAW

CASE NO. *89A-9*
EXHIBIT: *B*

OF COUNSEL TO:

Lumpe & Everett
Columbus, Ohio

Walter, Haverfield,
Buescher & Chockley
Cleveland, Ohio

SUITE 730, 37 WEST BROAD STREET
COLUMBUS, OHIO 43215

Telephone: (614) 899-9002
Cellular: (614) 271-5715
Facsimile: (614) 898-7217

July 25, 1989

Ohio Elections Commission
Attn: Donald J. McTigue, Counsel
Secretary of State's Office
14th floor - 30 E. Broad Street
Columbus, OH 43266-0418

RE: Ohio Elections Commission case no. 89A-9; Motion to Reconsider Dismissal of Complaint

Dear Don:

Enclosed is a Motion to Reconsider Dismissal of Complaint in the above-noted case heard by the Ohio Elections Commission July 17, 1989. The Complainant desires to have the Commission hear his complaint. Per your and Commission Chairman James' suggestions, we are filing this motion to reconsider.

Please let me know if you have any questions or need any additional information.

Sincerely,

Jennifer L. Brunner

Enclosure

BEFORE THE OHIO ELECTIONS COMMISSION
STATE OF OHIO

J. Michael Hayfield	(	Case No. 89A-9
	(	
vs.	(	
	(	
Margaret McIntyre	(	

Motion to Reconsider Dismissal of Complaint

Complainant moves that the Dismissal of his Complaint be reconsidered and that the complaint be set for a hearing.

Memorandum in Support of Motion

On July 17, 1989, the Ohio Elections Commission had scheduled the above-captioned case for a hearing. Complainant was not in attendance at that hearing, but was represented by counsel, named below, who was in attendance at that hearing. When Complainant's case was called at that hearing, Complainant's counsel requested and was denied the opportunity to represent Complainant at the hearing by the Chairman of the Commission. Following said denial, the Commission Chairman moved for dismissal of the complaint for want of prosecution. The motion was approved by the Commission.

At the time of the scheduled hearing of the above-captioned matter, Complainant was on a family vacation and had asked counsel named below to represent him at any Elections Commission hearings. Counsel named below had prepared for Complainant his complaint in the matter and his subsequent Motion to Exclude Evidence. The rules of the Ohio Elections Commission require no formal record of appearance. Complainant's counsel was in attendance at the scheduled hearing of the matter in question.

Complainant respectfully moves the Commission to reconsider the dismissal of his complaint July 17, 1989, and to set the matter for hearing. In the event the Commission grants Complainant's motion, Complainant will be represented by counsel named below.

Respectfully submitted,

_____

Jennifer L. Brunner
Attorney for Complainant
Suite 730, 37 W. Broad Street
Columbus, OH 4321

Ohio Elections Commission
State Office Tower, 14th Floor
Columbus, Ohio 43266-0418
(614) 466-2585

August 2, 1989

Case No. 89A-9
Hayfield v. McIntyre

TO: Margaret McIntyre

Please be advised that at its meeting of July 17, 1989, the Ohio Elections Commission adopted the following finding in the above referenced case:

That the alleged violations of R.C.3599.09, 3517.10(D) and 3517.13(E) are dismissed.

A request for reconsideration of the above matter has been received from the complainant. The request for reconsideration will be reviewed by the Commission at its meeting of Monday, August 28, 1989, at 8:30 A.M. The meeting will be held in the Annex Hearing Room on the third floor of the Ohio Statehouse Annex, Broad and Third Streets, Columbus, Ohio.

If you should have any questions, please feel free to contact me.

Very truly yours,

Donald J. McTigue
Commission Counsel

dlc
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CASE NO. *89A-9*
EXHIBIT: *4*

August 14, 1989.

Ohio Elections Commission
Donald J. McTigue, Counsel
14th. Floor
30 East Broad Street
Columbus, Ohio 43266-0418

RE: Ohio Elections Commission - Case No. 89A-9
Motion to Deny Reconsideration of Dismissal of Complaint

Mr. Donald J. McTigue:

Enclosed is a Motion to Deny the Reconsideration of the Dismissal of Complaint in the above-noted case that was filed with the Commission by Jennifer L. Brunner on July 25, 1989. The case was dismissed by the Commission at the July 17, 1989 hearing. The Complainant did not choose to appear and did not pre-arrange to be represented by counsel. Therefore, I am filing this Motion for Denial. I considered the matter important enough to appea
yr and I feel Mr. Hayfield did not. Therefore, I believe his Motion for Reconsideration should be Denied.

Sincerely,

Margaret McIntyre
5278 Broadview Road
Columbus, Ohio 43230

BEFORE THE OHIO ELECTIONS COMMISSION
STATE OF OHIO

J. Michael Hayfield — Case No. 89A-9

vs.

Margaret McIntyre

Motion to Deny Reconsideration of Dismissal of Complaint

Margaret McIntyre moves that the Ohio Elections Commission Deny the Motion filed by Jennifer Brunner for Reconsideration of Dismissal of Complaint on behalf of J. Michael Hayfield.

Memorandum in Support of Motion

On July 17, 1989, the Ohio Elections Commission had scheduled the above case for hearing. Complainant was not in attendance at that hearing and was not represented by counsel-of-record. When Jennifer Brunner stepped forward and offered to represent Mr. Hayfield, the Commission justifiably denied her request and dismissed the case. Considering Jennifer Brunner had filed against Margaret McIntyre also and that Jennifer Brunner is deeply involved with the Westerville School Administrators and that Jennifer Brunner is Professionally and personally involved with members of the Ohio Elections Commission and the Secretary of State's Office and its personnel and that at the present time Margaret McIntyre has filed charges against Jennifer Brunner with the Columbus Bar Association, it is my opinion that it would be a conflict of interest for Jennifer Brunner to represent any party or action against Margaret McIntyre before this Commission.

I respectfully move the Ohio Elections Commission

Deny the Motion for Reconsideration of Dismissal of Complaint.

Sincerely,

Margaret McIntyre
5278 Broadview Road
Columbus, Ohio 43230

BEFORE THE OHIO ELECTIONS COMMISSION

- - -

MICHAEL HAYFIELD,	:	
COMPLAINANT,	:	
VS.	:	CASE NO. 89A-9
MARGARET MCINTYRE,	:	
RESPONDENT.	:	

- - -

EXCERPT OF PROCEEDINGS
HAD BEFORE THE OHIO ELECTIONS COMMISSION, UNDER THE APPLICABLE RULES OF CIVIL PROCEDURE, TAKEN BEFORE ME, LINDY L. MEYER, JR., A NOTARY PUBLIC IN AND FOR THE STATE OF OHIO, AT THE STATEHOUSE ANNEX HEARING ROOM, COLUMBUS, OHIO, ON MONDAY, MARCH 19, 1990 AT 8:45 O'CLOCK A.M.

- - -

PROFESSIONAL REPORTERS, INC.
172 EAST STATE STREET, SUITE 203
COLUMBUS, OHIO 43215
PHONE 614/464-0675 (FAX) 614/464-2144

APPEARANCES:

COMMISSION MEMBERS:

MICHAEL IGOE, CHAIRMAN
DOROTHY WASHINGTON
MEROM BRACHMAN
JUDITH MOSS

ANTHONY J. CELEBREZZE, JR.
ATTORNEY GENERAL OF OHIO
BY MESSRS. DON MCTIGUE AND ROGER DEAL
ASSISTANT ATTORNEYS GENERAL
14TH FLOOR, STATE OFFICE TOWER
30 EAST BROAD STREET
COLUMBUS, OHIO 43266-0418

ALSO PRESENT:

DEBBIE CONN
MICHAEL HAYFIELD
MARGARET MCINTYRE

- - -

MONDAY MORNING SESSION
MARCH 19, 1990

- - -

MR. IGOE: ALL RIGHT. CASE NO. 89A-9; COMPLAINANT, MICHAEL HAYFIELD; RESPONDENT, MARGARET MCINTYRE. ALLEGATIONS ARE INCOMPLETE DISCLAIMER OF LITERATURE IN VIOLATION OF 3599.09, FAILURE TO FILE A DESIGNATION IN VIOLATION OF 3517.10, FAILURE TO FILE A PAC REPORT IN VIOLATION OF 3517.13(E).

MR. HAYFIELD, THIS IS YOUR OPPORTUNITY TO PRESENT EVIDENCE, TESTIMONY, TO SUPPORT THE COMPLAINT THAT YOU FILED AGAINST MS. MCINTYRE.

MR. HAYFIELD: GOOD MORNING, MR. CHAIRMAN.

MR. IGOE: SWEAR HIM IN, PLEASE.

- - -

MICHAEL HAYFIELD,
BEING BY ME FIRST DULY SWORN,
TESTIFIED AS FOLLOWS:

- - -

MR. HAYFIELD: ON APRIL 27TH I WAS GOING INTO A MEETING AT BLENDON MIDDLE SCHOOL, A TYPICAL SCHOOL MEETING. I ENCOUNTERED MRS. MCINTYRE DISTRIBUTING LITERATURE TO PARENTS GOING INTO THE MEETING, AND THAT LITERATURE IS LISTED AS EXHIBIT A, I BELIEVE, IN YOUR PACKET.

AT THAT TIME THE LITERATURE DID NOT CONFORM TO THE CAMPAIGN REGULATIONS AND DID NOT HAVE THE NAME OF A TREASURER OR AN ORGANIZATION, AND I SAID TO MRS. MCINTYRE AT THAT TIME, "IT DOESN'T CONFORM WITH CAMPAIGN LITERATURE."

I ENCOUNTERED MRS. MCINTYRE ON APRIL THE 18TH. I WAS AGAIN HANDED A PIECE OF LITERATURE, AND AT THAT TIME THERE WAS AFFIXED TO THAT LITERATURE SOME INAPPROPRIATE LABELINGS AND IT DID NOT CONFORM TO THE CAMPAIGN REGULATIONS, SO AT THAT TIME I ALSO SAID TO MRS. MCINTYRE, "THAT DOES NOT CONFORM," AT WHICH TIME SHE SAID SHE HAD STUDIED IT AND IT DID, SO THAT'S WHAT LED US TO COME TO THIS POINT IN TIME, AND ALL OF THAT IS INCLUDED IN MY AFFIDAVIT.

MR. IGOE: DO YOU KNOW WHETHER OR NOT ANYBODY OTHER THAN MRS. MCINTYRE WAS PASSING OUT THE LITERATURE THE FIRST TIME THAT YOU SAW HER? I MEAN DID

IT COME TO YOUR ATTENTION THAT THIS WAS BEING GENERALLY CIRCULATED?

MR. HAYFIELD: THERE WAS A PERSON IN THE PARKING LOT ON THE FIRST EVENING THAT I OBSERVED WITH MRS. MCINTYRE, AND I ASKED THAT PERSON WHO SHE WAS AND SHE SAID SHE WAS MRS. MCINTRYE'S DAUGHTER. SHE WAS ACCOMPANIED BY ANOTHER GENTLEMAN ABOUT THE SAME AGE AND I ASKED WHO HE WAS. SHE SAID THAT WAS HER BOYFRIEND.

MR. IGOE: WERE THEY PASSING OUT LITERATURE?

MR. HAYFIELD: YES, THE LITERATURE THAT'S ON EXHIBIT A. AT THAT TIME, THEN, I - THE TIME - IT WAS TIME FOR THE MEETING TO START, SO I WENT ON IN TO THE MEETING.

MR. IGOE: ANYONE HAVE ANY QUESTIONS?

MR. MCTIGUE: CROSS-EXAMINATION?

MR. IGOE: YOU WANT TO LOOK AT THAT?

(DISCUSSION OFF THE RECORD.)

MR. IGOE: MRS. MCINTYRE, YOU HAVE THE OPPORTUNITY TO ASK MR. HAYFIELD QUESTIONS ON THE COMPLAINT THAT HE HAS FILED AGAINST YOU. IF YOU WOULD LIKE TO DO IT FROM BACK THERE OR IF YOU'D LIKE TO DO IT STANDING UP, WHATEVER YOUR PREFERENCE, THIS IS YOUR OPPORTUNITY TO QUESTION HIM. THIS IS NOT -- WHEN YOU GET FINISHED ASKING HIM QUESTIONS, THEN YOU WILL HAVE AN OPPORTUNITY TO MAKE A STATEMENT OR PRESENT ANY OTHER KIND OF EVIDENCE THAT YOU WISH, BUT IF YOU HAVE

ANY SPECIFIC QUESTIONS FOR HIM, NOW'S THE TIME.

MRS. MCINTYRE: MR. HAYFIELD, IS IT NOT TRUE THAT THE TWO YOUNG PEOPLE IN THE PARKING LOT WERE GETTING OUT OF A CAR, ONE WAS MY SON, THE OTHER WAS HIS GIRL-FRIEND, AND THE WAY YOU OBTAINED THE FLIERS WAS THAT YOU TOOK THEM OUT OF THE YOUNG GIRL'S HAND AND TOLD HER SHE HAD NO BUSINESS ON THAT LOT AND NO BUSINESS PASSING OUT THOSE FLIERS?

MR. HAYFIELD: THAT IS NOT CORRECT. WHEN I APPROACHED THOSE FOLKS, THEY WERE PUTTING FLIERS IN WINDOW -- WINDSHIELD WIPERS, AND THE YOUNG LADY DID IDENTIFY HERSELF AS MRS. MCINTYRE'S DAUGHTER, QUOTE, HER DAUGHTER, WHEN I ASKED THE QUESTION.

MR. IGOE: ANYTHING ELSE?

MRS. MCINTYRE: NO.

MR. IGOE: ANY QUESTIONS?

MS. MOSS: NO.

MR. IGOE: WELL, LET'S GET HER --

MR. HAYFIELD, JUST OUT OF CURIOSITY, ARE YOU AFFILIATED WITH WESTERVILLE SCHOOLS?

MR. HAYFIELD: I'M THE ASSISTANT SUPERINTENDENT OF ELEMENTARY EDUCATION AND I WAS GOING TO A REGULARLY SCHEDULED SCHOOL MEETING AT BLENDON SCHOOL.

MR. IGOE: OKAY. THANKS.

MRS. MCINTYRE, THIS IS YOUR OPPOR-

TUNITY TO PRESENT YOUR SIDE OF THE CASE.

MRS. MCINTYRE: YES.
ON THE NIGHT THAT --

MR. IGOE: I'M SORRY.

WILL YOU SWEAR HER IN, PLEASE?

- - -

MARGARET MCINTYRE,
BEING BY ME FIRST DULY SWORN,
TESTIFIED AS FOLLOWS:

- - -

MR. IGOE: MA'AM, BEFORE YOU START, I HAVE A COUPLE OF QUESTIONS I WANT TO ASK YOU. I'VE GOT A COPY OF A LETTER DATED AUGUST 14TH, 1989 THAT'S MARKED AS EXHIBIT 4 IN THIS FILE, AND IN IT YOU HAVE A MOTION TO DENY RECONSIDERATION AND DISMISSAL OF THE COMPLAINT. DOES THAT LOOK FAMILIAR TO YOU?

MRS. MCINTYRE: YES, IT DOES.

MR. IGOE: OKAY. YOU INDICATE IN HERE THAT JENNIFER BRUNNER HAS FILED AGAINST MARGARET MCINTRYE AND IS DEEPLY INVOLVED WITH THE WESTERVILLE SCHOOL, AND ADMITTEDLY THAT JENNIFER BRUNNER IS PROFESSIONALLY AND PERSONALLY INVOLVED WITH MEMBERS OF THE OHIO ELECTIONS COMMISSION AND THE SECRETARY OF STATE'S OFFICE.

ARE YOU IMPLYING THAT THERE IS SOME SORT OF RELATIONSHIP THAT SHE HAS THAT IS GOING TO PREJUDICE ANYBODY IN THIS COMMISSION?

MRS. MCINTYRE: I FEEL THAT'S A CON-

FLICT OF INTEREST.

MR. IGOE: WHAT IS THE CONFLICT, MA'AM?

MRS. MCINTYRE: THE CONFLICT OF INTEREST WOULD BE THE FACT THAT SHE HAS ALREADY PUT CHARGES AGAINST ME AS FAR AS THE ELECTION COMMISSION IS CONCERNED. NOT ONLY THAT, SHE HAS BEEN AN EMPLOYEE OF THE ELECTION COMMISSION FOR MANY YEARS. TO ME THAT JUST SEEMS LIKE, YOU KNOW, SHE'S STRICTLY ON ONE SIDE, AND I DON'T REALLY SEE HOW THAT COULD BE BENEFICIAL TO ME.

MR. IGOE: IS THAT THE TOTAL EXTENT OF WHAT YOU'RE SAYING ABOUT PERSONAL AND PROFESSIONAL INVOLVEMENT IS IF SHE'S EMPLOYED BY THE ELECTION COMMISSION?

MRS. MCINTRYE: WELL, AND THAT SHE IS, WELL, WITHIN THE SCHOOL SYSTEM. SHE USED TO RUN CAMPAIGNS FOR THEM.

MR. IGOE: I'M NOT ASKING ABOUT THAT. I'M ASKING ABOUT HER PERSONAL AND PROFESSIONAL INVOLVEMENT WITH MEMBERS OF THIS COMMISSION, AND I'M ASKING YOU IF THERE'S SOME INFORMATION THAT YOU HAVE THAT YOU THINK IS GOING TO PREJUDICE ONE OF THE MEMBERS.

MRS. MCINTYRE: I DON'T -- I REALLY DON'T KNOW, BUT I WOULD WANT TO ELIMINATE THE POSSIBLE CHANCES OF THAT.

MR. IGOE: YOU MADE THE STATEMENT THAT SHE IS PERSONALLY AND PROFESSIONALLY INVOLVED, AND I WANT TO KNOW THE REASON FOR THAT, BECAUSE IF THERE'S SOMEBODY ON THIS COMMISSION YOU THINK HAS ANY PREJUDICE ABOUT THIS CASE, I

WANT TO KNOW ABOUT IT.

MRS. MCINTYRE: IS SHE NOT AN EMPLOYEE? HAS SHE NOT BEEN APPOINTED BY THE ELECTION COMMISSION?

MR. IGOE: I DON'T HAVE ANY IDEA.

MS. MOSS. NOT TO MY KNOWLEDGE.

MRS. MCINTYRE: WELL, THAT WAS INFORMATION THAT I RECEIVED, AND MRS. BRUNNER VERIFIED IT.

MS. MOSS: DURING WHAT TIME PERIOD DO YOU BELIEVE SHE WAS AN EMPLOYEE OF THE COMMISSION?

MRS. MCINTYRE: IT WOULD BE PRIOR TO ALL OF THIS HAPPENING.

MS. MOSS: WOULD IT HAVE BEEN PRIOR TO ANY OF THE CURRENT MEMBERS HAVING BEEN APPOINTED?

MRS. MCINTYRE: I REALLY DON'T KNOW HOW LONG THE CURRENT MEMBERS HAVE BEEN ON THE COMMISSION.

MR. MCTIGUE: SHE WAS THE LEGISLATIVE LIAISON FOR THE SECRETARY OF STATE.

MR. IGOE: OKAY. WELL, APPARENTLY SHE WAS EMPLOYED BY THE SECRETARY OF STATE'S OFFICE, BUT SHE'S NEVER BEEN EMPLOYED BY THE ELECTIONS COMMISSION.

MRS. MCINTYRE: WELL, YOU KNOW, THAT WAS THE ONLY INFORMATION THAT I HAD, AND YOU CAN SEE HOW I WOULD FEEL.

MR. IGOE: WELL, CAN YOU SEE HOW WE FEEL?

MRS. MCINTYRE: NO, NOT REALLY.

MR. IGOE: WELL, WHY WOULD YOU MAKE AN ALLEGATION THAT SHE'S GOT PERSONAL AND/OR PROFESSIONAL INVOLVEMENT WITH MEMBERS OF THIS COMMISSION?

MRS. MCINTYRE: I -- HOW MANY OF YOU KNOW MRS. BRUNNER PERSONALLY?

MR. IGOE: MA'AM, I KNOW YOU. I HAVE CERTAINLY SEEN YOU HERE SIX MONTHS IN A ROW. THAT'S THE EXTENT OF MY KNOWING MS. BRUNNER.

MRS. MCINTYRE: SHE'S WORKED RIGHT IN THIS BUILDING. I UNDERSTAND SHE WORKED DOWNSTAIRS AND THAT SHE WORKED FOR THE SECRETARY OF STATE, WHICH, OF COURSE, YOU WORK FOR THE SECRETARY OF STATE.

MR. IGOE: I DON'T WORK FOR THE SECRETARY OF STATE.

MRS. MCINTYRE: THE COMMISSION ISN'T THROUGH THE SECRETARY OF STATE?

MS. MOSS: NO, MA'AM, AND FOR YOUR INFORMATION, I NEVER SAW MRS. BRUNNER UNTIL WE WALKED INTO THE HEARING BEFORE THIS COMMISSION, AND FOR YOUR INFORMATION, I DID NOT APPRECIATE YOUR ALLEGATIONS, PARTICULARLY WHEN IT APPEARS THAT THEY ARE MADE WITHOUT ANY KNOWLEDGE OR ANY BASIS IN FACT WHATSOEVER.

MRS. MCINTYRE: ONLY ON THE INFORMATION THAT I HAD OBTAINED.

MS. MOSS: I CONSIDER IT PERSONALLY INSULTING AND I CONSIDER IT INSULTING TO

THIS ENTIRE COMMISSION.

MRS. MCINTYRE: WELL, IF I'M WRONG, THEN I'M SORRY, BUT LIKE I SAID, THE INFORMATION THAT I'D RECEIVED WAS THAT SHE HAD WORKED FOR THE COMMISSION.

MS. MOSS: FROM WHOM DID YOU RECEIVE YOUR INFORMATION? WHAT EFFORTS DID YOU MAKE TO VERIFY THAT INFORMATION BEFORE YOU MADE THESE ACCUSATIONS?

MRS. MCINTYRE: I ASKED MRS. BRUNNER STRAIGHT OUT, "DID YOU WORK FOR THE ELECTIONS COMMISSION?" AND SHE SAID YES. NOW, WHETHER IT WAS PRIOR TO YOU, I HAVE NO IDEA, BUT THAT WAS -- I WAS GOING, LIKE I SAID, ON THE INFORMATION THAT I HAD OBTAINED.

MR. IGOE: ANYBODY ELSE WANT TO --

MR. BRACHMAN: I'D JUST LIKE TO SUBSCRIBE TO THIS -- I'D LIKE TO SUBSCRIBE TO THE VIEW OF THE COMMISSION AS TO THE TOTAL UNACCEPTABILITY OF THE APPARENT ALLEGATIONS, AND THEN TO FURTHER NOTE THAT THE CHAIRMAN HAS TAKEN VERY PROPER COURSE IN EXAMINING WHAT CERTAINLY APPEARS TO BE A FALSE ALLEGATION THAT HAS NO WARRANT REGARDING THIS COMMISSION OR ANY MEMBERS AND OBVIOUSLY HAS NO REFLECTION OR CONNECTION TO THE TYPE OF CASE THAT IS BEFORE US.

MR. IGOE: OKAY.

MA'AM?

MRS. MCINTYRE: YES.

MR. IGOE: PLEASE PRESENT YOUR CASE.

MRS. MCINTYRE: THE INFORMATION IS IN FRONT OF YOU ON THE FLIERS THAT I DISTRIBUTED. I WAS NOT -- I WAS DOING IT AS AN INDIVIDUAL. I HAVE NEVER -- I WAS NEVER A COMMITTEE. THERE WAS NEVER ANYONE ELSE INVOLVED. MY SON AND HIS GIRLFRIEND DROVE UP WITH ME, AND THEY WERE NOT PASSING OUT, AS FAR AS I KNOW, UNLESS THEY WERE DOING IT IN THE PARKING LOT. NOW, THERE WAS A -- MY NAME WAS ON IT, MY ADDRESS WAS ON IT, AND IF MR. HAYFIELD CAME UP WITH SOMETHING THAT DID NOT HAVE IT, THEN I DON'T KNOW WHERE HE GOT IT.

MR. IGOE: MA'AM, I'VE GOT -- ACTUALLY I HAVE THREE COPIES OF THE SAME HANDOUT. THE FIRST ONE IS SIGNED -- THIS IS EXHIBIT A -- SIGNED "THANK YOU, CONCERNED PARENTS AND TAXPAYERS," WHICH IS PLURAL, OBVIOUSLY. THE NEXT ONE I HAVE IS EXHIBIT B, WHICH SAYS, "THANK YOU, CONCERNED PARENTS AND TAXPAYERS. NOT PAID FOR BY PUBLIC FUNDS."

NOW, DID YOU PUT THAT INCLUSION "NOT PAID FOR BY PUBLIC FUNDS" ON THE SECOND DOCUMENT?

MRS. MCINTYRE: YES, I DID.

MR. IGOE: OKAY. THEN I HAVE A THIRD ONE, WHICH YOU'VE ATTACHED WITH A COPY OF AN AFFIDAVIT FROM THE PRINTER, AND THIS IS EXHIBIT 1, AFFIDAVIT FROM WHOEVER OWNS INSTANT COPY, THAT SAYS YOU'RE A LAW-ABIDING CITIZEN AND WOULDN'T DO ANYTHING ILLEGAL. I DON'T HAVE ANY REASON TO NOT BELIEVE THAT.

AND IT SAYS, "CONCERNED PARENTS AND TAXPAYERS, MRS. J. R. MCINTYRE, 5278 BROADVIEW ROAD, COLUMBUS, NOT PAID WITH PUBLIC FUNDS." WAS THAT DISTRIBUTED ALSO?

MRS. MCINTYRE: YES IT WAS.

MR. IGOE: OKAY. AND THIS WAS DONE AT SOME POINT AFTER A AND B WERE PASSED OUT?

MRS. MCINTYRE: NO. AS FAR AS I KNOW, THEY WERE ALL THE SAME AS THEY WERE BEING DISTRIBUTED.

MR. IGOE: YOU MEAN YOU DIDN'T GO BACK TO THE PRINTER AND HAVE THIS INCLUDED AND TYPED?

MRS. MCINTYRE: THERE WERE SOME EXTRA ONES MADE, BECAUSE WE RAN OUT AFTER THE FIRST.

MR. IGOE: MA'AM, WHEN YOU HAD THE EXTRA ONES MADE, IS THAT WHEN YOU HAD YOUR NAME AND ADDRESS PUT ON IT?

MRS. MCINTYRE: LET ME SEE.

MR. IGOE: HERE'S THE FIRST ONE.

MRS. MCINTYRE: NO, MY NAME SHOULD HAVE BEEN ON HERE RIGHT UNDERNEATH THIS ONE, ON THIS ONE RIGHT HERE, THE SAME AS IT IS ON HERE.

MR. IGOE: WHAT ABOUT THIS ONE?

MRS. MCINTYRE: SHOULD HAVE BEEN THE SAME, BECAUSE THESE ARE ONE AND THE SAME.

MR. IGOE: BUT DIDN'T YOU JUST TELL ME YOU PUT THIS IN --

MRS. MCINTYRE: YEAH, BUT THOSE WERE WRITTEN IN. THEY SHOULD HAVE BEEN WRITTEN IN ON ALL OF THEM. NOW, IF THIS WAS CUT OFF --

MR. IGOE: THEN WHY DIDN'T YOU WRITE YOU NAME HERE?

MRS. MCINTYRE: THE NAME WOULD HAVE BEEN UNDER THIS.

MR. IGOE: IT'S NOT UNDERNEATH HERE.

MRS. MCINTYRE: I DON'T KNOW ABOUT THIS ONE. SOME OF THEM WERE, BUT NOT MANY OF THEM, BECAUSE SOME WERE RUN OFF ON A HOME COMPUTER AND SOME WERE RUN OFF BY THE PRINTER.

MR. IGOE: OKAY. DO YOU HAVE ANYTHING FURTHER?

MRS. MCINTYRE: AND AS FAR AS SAYING "CONCERNED PARENTS AND TAXPAYERS," THE LEVIES HAVE BEEN VOTED DOWN BEFORE, AND I HAVE TALKED TO A LOT OF PEOPLE WHO WERE REALLY CONCERNED ABOUT ONE LEVY RIGHT AFTER ANOTHER AND THE CAUSES FOR THE LEVIES. NOW, YOU SAY THAT YOU REPRESENT -- A PERSON IN OFFICE, YOU SAY THEY REPRESENT THE PEOPLE. OKAY. PEOPLE I HAD TALKED TO HAD ASKED ME AND WE HAD TALKED ABOUT IT; "WHAT ARE WE GOING TO DO ABOUT IT?" I SAYS, "THE ONLY THING WE CAN DO IS TO FIGHT IT WITH EVERY WAY WE KNOW HOW TO FIGHT IT WITH."

NOW, I FEEL THAT BEING DENIED PASSING OUT THIS LITERATURE WOULD DEFINITELY BE AN INFRINGEMENT OF MY FIRST AMENDMENT RIGHTS, BECAUSE I WAS WORKING AS AN IN-

DIVIDUAL CITIZEN, NOT AS A COMMITTEE, NOT AS A GROUP; THEREFORE, I DIDN'T NEED TO FILE ANYTHING.

MR. IGOE: EXCEPT YOU DIDN'T IDENTIFY YOURSELF AS AN INDIVIDUAL; YOU IDENTIFIED YOURSELF AS A GROUP.

MRS. MCINTYRE: WELL, THE ONES I PASSED OUT, TO THE BEST OF MY KNOWLEDGE, ALL OF THEM HAD MY NAME ON THEM, ALL OF THEM. I WOULDN'T HAVE PASSED IT OUT WITHOUT MY NAME ON IT.

MR. IGOE: ANY QUESTIONS?

MS. MOSS: I JUST HAVE ONE QUESTION OF -- I DON'T REMEMBER WHO I WANTED TO ASK IT OF.

MRS. MCINTYRE, THESE PARTICULAR PIECES OF LITERATURE BEFORE US HAVE NOT BEEN A SUBJECT OF ANY PRIOR COMPLAINT BEFORE US; IS THAT CORRECT?

MRS. MCINTYRE: NO.

MS. MOSS: NO, THAT'S NOT CORRECT, OR NO, THEY HAVE NOT?

MRS. MCINTYRE: I KNOW THEY HAVE NOT BEEN BEFORE YOU BEFORE THIS, AND IF THERE WAS SUCH A GREAT CONCERN ABOUT THE VIOLATION, WHY DID MR. HAYFIELD WAIT A YEAR TO FILE THEM?

MS. MOSS: THE ONLY OTHER QUESTION I HAD IS I BELIEVE I HEARD YOU TELL MR. IGOE THAT SOME OF EXHIBIT A AND B WERE PRINTED OFF A HOME COMPUTER AND SOME WERE PROFESSIONALLY PRINTED --

MRS. MCINTYRE: YES.

MS. MOSS: -- IS THAT CORRECT?

MRS. MCINTYRE: YES.

MS. MOSS: OKAY. AND ON THOSE THAT WERE RUN OFF ON THE HOME COMPUTER, DID YOU RUN THOSE OFF YOURSELF?

MRS. MCINTYRE: YES, I DID.

MS. MOSS: OKAY. AND YOU PUT YOUR NAME AND ADDRESS ON THEM --

MRS. MCINTYRE: YES, I DID.

MS. MOSS: -- ON THE HOME COMPUTER?

MRS. MCINTYRE: YES.

MS. MOSS: ON THE ONES THAT WERE PROFESSIONALLY PRINTED, WERE THOSE PRINTED OFF OF YOUR ORIGINAL OR WERE THEY PROFESSIONALLY TYPESET?

MRS. MCINTYRE: NO, WE HAD -- I HAD TYPED THEM OUT, AND THE PRINTER HAD MADE SOME CORRECTIONS BEFORE HE PRINTED THEM. HE HAD MADE SOME ERRORS IN THEM, AND THEN HE WENT BACK AND CHANGED THEM, BUT BASICALLY THE LAST ONES THAT WERE PASSED OUT WERE DONE BY THE PRINTER.

MS. MOSS: OKAY. SO, THEY WERE PROFESSIONALLY TYPESET; THEY WERE NOT RUN OFF FROM YOUR ORIGINAL COPY?

MRS. MCINTYRE: NO, NOT THAT WERE -- FROM THE VERY ORIGINAL, NO, NOT THAT -- FROM THE ONE THAT CAME OFF MY COMPUTER.

MS. MOSS: OKAY. THANK YOU.

(DISCUSSION OFF THE RECORD.)

MR. HAYFIELD: MR. CHAIRMAN, MAY I SPEAK, SIR?

MR. IGOE: I THINK WE'RE FINISHED --

MR. HAYFIELD: OKAY.

MR. IGOE: -- UNLESS YOU GOT SOMETHING ELSE, OTHER EVIDENCE, BUT EDITORIAL COMMENTS, I DON'T THINK WE --

MR. HAYFIELD: ONE COMMENT. AFTER -- THE ORIGINAL MEETINGS WE HAD SCHEDULED HAD NOTHING TO DO WITH THE CAMPAIGN. AFTER THE MEETING WE FOUND MOST OF THE FLIERS WERE DISTRIBUTED IN A WASTEPAPER CAN, AND I HAD THE CUSTODIAN IN EACH MEETING GO THROUGH TO SEE IF WE COULD FIND ANY PIECE OF LITERATURE THAT HAD THE NAMES AFFIXED TO IT. WE FOUND NONE, AND I SAW NO GOOD REASON TO SUBMIT BOXES OF LITERATURE TO YOU.

(DISCUSSION OFF THE RECORD.)

MS. WASHINGTON: IN THE CASE OF 89A-9, FIND NO VIOLATION OF OHIO REVISED CODE 3517.10(D), NO VIOLATION OF 3017.13(E), FIND A VIOLATION OF 3599.00 AND IMPOSE A FINE OF -- EXCUSE ME, 3599.09 AND IMPOSE A VIOLATION OF $100.

MS. MOSS: SECOND.

MR. IGOE: ALL IN FAVOR.

ALL COMMISSION MEMBERS: AYE.

MR. IGOE: THANK YOU.

- - -

[Certificate Omitted in Printing]

Ohio Elections Commission
State Office Tower, 14th Floor
Columbus, Ohio 43266-0418
(614) 466-2585

March 30, 1990

CASE NO. 89A-9
Hayfield v. McIntyre

TO: Margaret McIntyre

Please be advised that the Ohio Elections Commission adopted the following finding(s) in the above-referenced case at its meeting of March 19, 1990:

> That there is no violation of Ohio's Revised Code section(s) 3517.10(D) and 3517.13(E).
>
> That there is a violation of Ohio Revised Code section 3599.09 and therefore, the Commission imposes upon Margaret McIntyre a fine of $100.

The above fines must be paid no later than thirty days after the date of this letter. Payment should be made payable to The Ohio Elections Commission at the above address.

If you have any questions, please feel free to contact me.

Very truly yours,

Roger F. Deal
Commission Counsel

RFD:ds

cc: Jennifer L. Brunner

0024E

**IN THE COMMON PLEAS COURT
OF FRANKLIN COUNTY
COLUMBUS, OHIO**

Margaret McIntyre,
Appellant,

vs. Case No.

Ohio Elections Commission,
Appellee.

NOTICE OF APPEAL

Now comes Appellant, Margaret McIntyre, by and through counsel, and appeals the decision of the Ohio Elections Commission mailed March 30, 1990, in Ohio Elections Commission Case No. 89A-9 titled "Hayfield v. McIntyre" on the basis that the decision operates to deny Appellant rights guaranteed by the 5th, 6th and 14th Amendments to the United States Constitution.

George Q. Vaile (VAI01)
Attorney for Appellant
620 Vancouver Drive
Westerville, Ohio 43081
Phone: (614) 891-0670

[Certificate Omitted in Printing]

Decision of Judge Thompson in Common Pleas Court

[Reprinted in appendix to Petition for *Certiorari* p.A-33]

IN THE COMMON PLEAS COURT OF FRANKLIN COUNTY COLUMBUS, OHIO

MARGARET MC INTYRE, Appellant,	:	
vs.	:	Case No. 90CVE-04-2835
OHIO ELECTIONS COMMISSION	:	JUDGE THOMPSON
Appellee.	:	

JUDGMENT ENTRY

In accordance with the Decision of the Court filed on September 10, 1990, the decision of the Appellee, Ohio Elections Commission, against the Appellant, Margaret McIntyre, rendered on March 19, 1990, in which the Appellee found that the Appellant had violated Section 3599.09 of the Ohio Revised Code and should pay a fine of $100.00, is hereby reversed for the reason that the March 19, 1990 ruling of the Appellee is not supported by the Record and represents an unconstitutional application of Section 3599.09.

(s) Thompson
Judge Tommy L. Thompson

Approved:

_____
George Q. Vaile (VAI01)
Attorney for Appellant
620 Vancouver Drive
Westerville, Ohio 43081
Phone: (614) 891-0670

ANTHONY J. CELEBREZZE, JR., Attorney General

by Catherine M. Cola (COL49)
Assistant Attorney General
Chief Counsel's Staff
Attorney for Appellee
30 East Broad Street, 16th Floor
Columbus, Ohio 43266-0410
Phone: (614) 466-2872

IN THE COURT OF APPEALS
TENTH APPELLATE DISTRICT
FRANKLIN COUNTY, OHIO

MARGARET McINTYRE,	:	
Plaintiff-Appellee,	:	*90AP1221*
	:	
v.	:	CASE NO. ____
	:	
OHIO ELECTIONS	:	
COMMISSION,	:	
Defendant-Appellant.	:	

NOTICE OF APPEAL

Please take notice that Defendant-Appellant, the Ohio Elections Commission, hereby appeals the Judgment Entry issued on October 2, 1990 in the case of *Margaret McIntyre v. Ohio Elections Commission*. Case No. 90CVF-04-2835 rendered by the Court of Common Pleas. A copy of the Judgment Entry is attached to this notice of appeal.

Respectfully submitted,
ANTHONY J. CELEBREZZE, JR.
Attorney General

CATHERINE M. COLA (COL49)
Assistant Attorney General
Chief Counsel's Staff
30 East Broad St., 15th Floor
Columbus, OH 43266-0410
614/466-2872

Opinion of Court of Appeals

[Reprinted in appendix to Petition for *Certiorari* p.A-16]

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Margaret McIntyre, Appellant-Appellee,	:	
v.	:	No. 90AP-1221
Ohio Elections Commission Appellee-Appellant.	:	(REGULAR CALENDAR)

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the opinion of this court rendered herein on April 7, 1992, appellant's assignments of error are sustained and appellee's assignment of error is overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion.

BRYANT and PETREE, JJ.

By_____
Judge Peggy Bryant

cc: George Q. Vaile
Patrick A. Devine

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Margaret McIntyre,
Appellant-Appellee,

v.

Case No. 90AP-1221
(Regular Calendar)

Ohio Elections Commission,
Appellee-Appellant.

NOTICE OF APPEAL

Appellant-Appellee, Margaret McIntyre, respectfully gives Notice, that she is appealing the decision of the Court of Appeals, Tenth Appellate District, Franklin County, Ohio, rendered in this matter and journalized on April 10, 1992 to the Ohio Supreme Court. A copy of the *Journal Entry of Judgment* is attached hereto.

Respectfully submitted,

George Q. Vaile
Registration Number 0023918
Attorney for Appellant- Appellee
776 County Road 24
Marengo, Ohio 43334
Ph: (614) 747-2218 or 891-0670

[Certificate Omitted in Printing]

Ohio Supreme Court Opinion

[Reprinted in appendix to Petition for *Certiorari* p.A-1]

THE SUPREME COURT OF OHIO

1993 TERM

90CVF04-2835

To wit: September 22, 1993

Margaret McIntyre, Appellant,	:	Case No. 92-1147
v.	:	**JUDGMENT ENTRY**
Ohio Elections Commission, Appellee.	:	**APPEAL FROM THE COURT OF APPEALS**

This cause, here on appeal from the Court of Appeals for Franklin County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Franklin County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

COSTS:

Motion Fee, $40.00, paid by George Q. Vaile.

(Court of Appeals No. 90AP1221)

THOMAS J. MOYER
Chief Justice

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

MARGARET McINTYRE, Appellant,	:	Case No. 90CVF-04-2835
v.	:	JUDGE THOMPSON
OHIO ELECTIONS COMMISSION, Appellee.	:	

JUDGMENT ENTRY

In accordance with the mandate issued by the Supreme Court on September 22, 1993, and consistent with the Supreme Court's opinion reported at 67 Ohio St. 3d 391 (Case No-91-1147), Judgment is hereby entered for the appellee Ohio Elections Commission.

WHEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that R.C. 3599.09 is constitutional and that the decision of the Ohio Elections Commission finding appellant in violation of R.C. 3599.09 and fining her $100 is AFFIRMED as being supported by reliable, probative, and substantial evidence, and in accordance with law. Costs to be paid by appellant.

SO ORDERED:

TOMMY L. THOMPSON, JUDGE

APPROVED:

George Q. Vaile (0023918)
776 Country Road 24
Marengo, Ohio 43334
Attorney for Margaret McIntyre

Patrick A. Devine (0022919)
Assistant Attorney General
30 East Broad Street, 15th Floor
Columbus, Ohio 43215
Attorney for Ohio Elections Commission

IN THE COURT OF COMMON PLEAS,
FRANKLIN COUNTY, OHIO

MARGARET McINTYRE,	:	
	:	
Appellant,	:	Case No. 90CVF-04-2835
	:	
v.	:	
	:	JUDGE THOMPSON
	:	
OHIO ELECTIONS COMMISSION,	:	
	:	
Appellee.	:	

STAY ORDER

For good cause shown, this Court's Judgment Entry affirming the decision of the Ohio Elections Commission in accordance with the Ohio Supreme Court's opinion reported at 67 Ohio St. 3d 391 is hereby STAYED pending the outcome of the United States Supreme Court's disposition of Margaret McIntyre's petition for writ of *certiorari*.

SO ORDERED:

TOMMY L. THOMPSON, JUDGE

APPROVED:

George Q. Vaile (0023918)
776 Country Road 24
Marengo, Ohio 43334
Attorney for Margaret McIntyre

Patrick A. Devine (0022919)
Assistant Attorney General
30 East Broad Street, 15th Floor
Columbus, Ohio 43215
Attorney for Ohio Elections Commission

mcintyre.sta

No. 93-986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MARGARET MCINTYRE,

Petitioner,

—v.—

OHIO ELECTIONS COMMISSION,

Respondent.

ON WRIT OF *CERTIORARI* TO THE SUPREME COURT OF OHIO

BRIEF OF PETITIONER

Steven R. Shapiro
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55 West 12th Avenue
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(614) 292-6821

George Q. Vaile
776 County Road 24
Marengo, Ohio 43334
(614) 747-2218

QUESTIONS PRESENTED

1. Did the Ohio Supreme Court err in upholding an Ohio statute that imposes a flat ban on distribution of anonymous political campaign leaflets?

2. Even if facially valid, can Ohio's statute banning anonymous political campaign literature be applied to punish petitioner's distribution of political leaflets advocating defeat of a nonpartisan referendum on school taxes without violating the First Amendment?

LIST OF PARTIES AND RULE 29.1 STATEMENT

The two parties to the proceedings and in this Court are petitioner Margaret McIntyre, the defendant-appellant below, and respondent Ohio Elections Commission, the enforcement agency and appellee below. Margaret McIntyre is a private citizen.

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TABLE OF AUTHORITIES

No. 93-986

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

MARGARET McINTYRE,

Petitioner,

-v.-

OHIO ELECTIONS COMMISSION,

Respondent.

ON WRIT OF *CERTIORARI*
TO THE SUPREME COURT OF OHIO

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported as *McIntyre v. Ohio Elections Commission*, at 67 Ohio St.3d 391 (1993). It is reprinted in the petition appendix at pages A1-A15. The finding of the Ohio Elections Commission is represented in the petition appendix at page A40. The opinions of the Franklin County Court of Common Pleas and the Court of Appeals of Ohio for the Tenth Appellate District are unpublished and are reprinted in the petition appendix at pages A33-A35 and A16-A32 respectively.

JURISDICTION

On March 30, 1989, petitioner Margaret McIntyre was charged with violating Ohio Revised Code §3599.09 which prohibits the distribution of campaign leaflets that do not contain the name of the person who prepares and distributes them. On March 30, 1990, the Ohio Elections Commission issued its decision finding that peti-

tioner violated R.C. §3599.09 and fined her $100. On April 6, 1990, petitioner appealed this case to the Franklin County Court of Common Pleas. On October 2, 1990, the Court of Common Pleas reversed the decision of the Ohio Elections Commission and held that §3599.09 was unconstitutional as applied to the petitioner. On April 7, 1992, the Court of Appeals of Ohio for the Tenth Appellate District reversed the Court of Common Pleas. On September 22, 1993, the Ohio Supreme Court affirmed the appellate court and held that §3599.09 is constitutional on its face and as applied to the facts of this case.

The jurisdiction of this Court to review the September 22, 1993 judgment of the Ohio Supreme Court is invoked under 28 U.S.C. §1257(a).

THE CONSTITUTIONAL PROVISIONS AT ISSUE

Constitution of the United States, Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

THE STATUTORY PROVISION AT ISSUE

Ohio Revised Code §3599.09.

> (A) No person shall write, print, post, or distribute, or cause to be written, printed, posted, or distributed, a notice, placard, dodger, advertisement, sample ballot, or any other form of general publication which is designed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election, or make an expenditure for the purpose of financing political communications through newspapers, magazines, outdoor advertising facilities, direct mailings, or other similar types of general public political advertising, or through flyers, handbills, or other nonperiodical printed matter, unless there appears on such form of publication in a conspicuous place or is contained within said statement the name and residence or business address of the chairman, treasurer, or secretary of the organization issuing the same, or the person who issues, makes, or is responsible therefore. The disclaimer "paid political advertisement" is not sufficient to meet the requirements of this division. When such publication is issued by the regularly constituted central or executive committee of a political party, organized as provided in Chapter 3517. of the Revised Code, it shall be sufficiently identified if it bears the name of the committee and its chairman or treasurer. No person, firm, or corporation shall print or reproduce any notice, placard, dodger, advertisement, sample ballot, or any other form of publication in violation of this section. This section does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution.

The secretary of state may, by rule, exempt, from the requirements of this division, printed matter and certain other kinds of printed communications such as campaign buttons, balloons, pencils, or like items, the size or nature of which makes it unreasonable to add an identification or disclaimer. The disclaimer or identification, when paid for by a campaign committee, shall be identified by the words "paid for by" followed by the name and address of the campaign committee and the appropriate officer of the committee, identified by name and title.

STATEMENT OF THE CASE

On March 19, 1990, Mrs. Margaret McIntyre was fined $100 by the Ohio Elections Commission for distributing leaflets opposing the passage of a local school tax levy. The Ohio Elections Commission imposed the fine because the leaflets did not contain her name and address as required by Ohio Revised Code §3599.09, which prohibits the distribution of all anonymous campaign literature. The Ohio Supreme Court upheld the fine on September 22, 1993.

The events in this case began on the evening of April 27, 1988, outside the Blendon Middle School in Westerville, Ohio. At that time, Mrs. McIntyre; her son, a student in the Westerville schools; and his girlfriend were distributing leaflets opposing the passage of a school tax levy that was to be voted on at a nonpartisan referendum scheduled for the following week. (J.A.30). Mrs. McIntyre was distributing the leaflets at the Blendon Middle School that evening because it was the site of a previously scheduled public meeting at which the Westerville superintendent of schools planned to address the merits of the tax levy. (J.A.28). During the meeting the superintendent specifically made reference to statements contained in the leaflets. (J.A.15).

Mrs. McIntyre stood outside the school near the doorway to the meeting room and handed leaflets to persons as they entered the building. (J.A.15). Her son and his girlfriend distributed additional leaflets in the school parking lot by placing them under automobile windshield wipers. (J.A.30). The leaflets stated:

VOTE NO
ISSUE 19 SCHOOL TAX LEVY

Last election Westerville Schools, asked us to vote yes for new buildings and expansions programs. We gave them what they asked. We knew there was crowded conditions and new growth in the district.

Now we find out there is a 4 million dollar deficit -- WHY?

We are told the 3 middle schools must be split because of over-crowding, and yet we are told 3 schools are being closed -- WHY?

A magnet school is not a full operating school, but a specials school.

Residents were asked to work on a 20 member commission to help formulate the new boundaries. For 4 weeks they worked long and hard and came up with a very workable plan. Their plan was totally disregarded -- WHY?

WASTE of tax payers dollars must be stopped. Our children's education and welfare must come first. **WASTE CAN NO LONGER BE TOLERATED.**

PLEASE VOTE NO
ISSUE 19

THANK YOU,

CONCERNED PARENTS
AND
TAX PAYERS

J. Michael Hayfield, Assistant Superintendent of Elementary Education for the Westerville schools, observed Mrs. McIntyre distributing the leaflets. He examined the leaflets and told her that she was not in compliance with Ohio election laws. (J.A.28).

On the next evening, April 28, 1988, a similar school meeting was held at the Walnut Springs Middle School. Again, petitioner stood outside of the school and distributed leaflets opposing the school tax levy to persons entering the building to attend the meeting. Again, Mr. Hayfield observed her distributing leaflets and noted that they did not conform to Ohio election laws. (J.A.15).

Following Mrs. McIntyre's leafletting on April 27, 1988 and April 28, 1988, the school tax levy failed. It was again defeated in a second election. In November of 1988, on the third try, it finally passed. (Pet. App. A10). On April 6, 1989, five months after the passage of the twice-defeated levy, and approximately one year after her leafletting, Mrs. McIntyre received a letter from the Ohio Elections Commission informing her that a complaint had been filed against her. (J.A.10). The complaint, filed by Assistant Superintendent Hayfield, charged her with violating Ohio Revised Code §3599.09 and two other statutes because the leaflets she had distributed at the Blendon and Walnut Springs Middle Schools, during the two evenings in April of the previous year, did not contain her name and address.[1]

Initially, the charges were dismissed for want of prosecution. (J.A.18). A short time later, they were reinstated at the request of Assistant Superintendent

[1] In addition to being charged with violating §3599.09, prohibiting distribution of anonymous campaign materials, Mrs. McIntyre was charged with violations of Ohio Revised Code §3571.10(D)(failure to file a designation of treasurer) and §3517.13(E)(failure to file a PAC report).

Hayfield. On March 19, 1990, a hearing was held before the Ohio Elections Commission on the charges against Mrs. McIntyre. At the conclusion of its March 19th hearing, the Ohio Elections Commission found that Mrs. McIntyre had distributed unsigned leaflets and fined her $100 for violating Ohio Revised Code §3599.09; the other charges were dismissed.[2] (J.A.41).

On September 10, 1990, the Franklin County Court of Common Pleas reversed, holding that §3599.09 was unconstitutional as applied. (Pet.App. A33). On April 7, 1992, the Ohio Court of Appeals reversed the Court of Common Pleas and reinstated the fine. (Pet.App. A16). That decision was affirmed by the Ohio Supreme Court on September 22, 1993, which concluded that:

> The requirement of R.C. 3599.09 that persons responsible for the production of campaign literature pertaining to the adoption or defeat of a ballot issue identify themselves as the source thereof is not violative

[2] Mrs. McIntyre was unrepresented throughout the administrative proceedings and the administrative record is, therefore, a sparse one. Prior to the March 19th hearing, Mrs. McIntyre wrote a letter to counsel for the Ohio Elections Commission acknowledging that some of the leaflets she had distributed were unsigned. (J.A.12). At the hearing, she both denied any intent to violate the law and objected to the law as "an infringement of her First Amendment rights." (J.A.36, 38-39). She also testified that she had talked to many other people who were concerned about the levy and felt she was representing their views as well as her own. (J.A.38). Assistant Superintendent Hayfield repeated the statement made in his prior affidavit, that he had seen Mrs. McIntyre distribute leaflets without her name and address.

The Commission's decision upholding the complaint was issued the same day. It was not accompanied by any written opinion and contained no factual findings other than the implicit finding that Mrs. McIntyre had distributed anonymous leaflets and thereby violated the law. Thus, the only issue raised or considered on appeal by the Ohio state courts was whether the ban on anonymous campaign literature set forth in §3599.09 is constitutional.

of the right to free speech guaranteed by the First Amendment to the United States Constitution and Section 11, Article I of the Ohio Constitution.

(Pet.App. A1).[3]

SUMMARY OF ARGUMENT

Petitioner Margaret McIntyre has been fined under §3599.09 of the Ohio Election Code for preparing and distributing leaflets urging a vote against a school tax levy because the leaflets did not contain her name and address. The Ohio Supreme Court held that §3599.09 does not violate the First Amendment even though it indiscriminately bans the distribution of all anonymous political campaign literature. The Ohio Supreme Court erred in upholding the statute because its decision is inconsistent with *Talley v. California*, 362 U.S. 60 (1960), which holds that a flat ban on anonymous leafletting is unconstitutional because it deters the speech of those who fear retaliation and thereby restricts freedom of expression.

This Court's protection of anonymous speech in *Talley* rests on a firm historical foundation. The drafters of the Constitution were well aware of efforts by the government of England to punish political and religious dissenters for their anonymous publications. The drafters were also aware of the frequent use of anonymous political publications to criticize the English governance of the American colonies. The use of anonymous political publications as part of public discourse continues today. Consistent with this history and practice, the Court has repeatedly held that the First Amendment protects anonymous speech. *E.g., Thomas v. Collins*, 323 U.S. 516 (1945); *Bates v. Little Rock*, 361 U.S. 516 (1960); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

[3] According to Rule 1(b) of the Ohio Supreme Court Rules for the Reporting of Opinions, this statement, which is the syllabus of the case, "states the controlling point or points of law decided . . . ."

The constitutionality of §3599.09 is to be measured by the compelling state interest test because it is a regulation of the fundamental right to speech and press. Most recently, this Court applied the compelling state interest test in reviewing the regulation of election related speech in *Burson v. Freeman*, 504 U.S. __, 112 S.Ct. 1846 (1992). The Ohio Supreme Court erred in concluding that the more relaxed standard of review applicable to ballot access and voting regulations was applicable to this case. This is because §3599.09 is a regulation of political speech in public places intended to persuade voters and is not a ballot access or voting regulation.

Applying a strict scrutiny standard, §3599.09 is unconstitutional because Ohio has not demonstrated a compelling state interest and has not narrowly tailored its law. The failure of §3599.09 to serve a compelling state interest is demonstrated by the fact that it covers all anonymous election related leaflets and pamphlets. It is not confined to intentionally false and fraudulent statements. In addition, it extends to communications about referendum issues that cannot be smeared or libeled. *Illinois v. White*, 506 N.E.2d 1284 (Ill. 1987). Section 3599.09 is not narrowly tailored because it extends to election related publications at any time in any place. As a consequence, it is a prophylactic rule requiring disclosure, even when no legitimate interest is actually served.

Finally, §3599.09 is unconstitutional as applied to the facts of this case. Petitioner is a street corner leafletter who has engaged in core political speech about a public issue. As a result, no law, including §3599.09, can be applied to her speech without violating the First Amendment. *Lovell v. Griffin*, 303 U.S. 444 (1938).

ARGUMENT

Ohio's indiscriminate statutory prohibition against the distribution of anonymous election campaign leaflets and other publications is unconstitutional on its face and as applied to Mrs. McIntyre's leaflets. Included within its reach are campaign publications, like Mrs. McIntyre's, that are disseminated in order to "promote the adoption or defeat of any issue" in a nonpartisan referendum. In fact, the statute is so broad that, had it been in effect during the nonpartisan campaign to ratify the United States Constitution, it would have prohibited the publication and distribution of the FEDERALIST PAPERS because, like Mrs. McIntyre's leaflets, they lacked the "name and residence . . . of the person . . . responsible therefore."

I. OHIO'S PROHIBITION AGAINST THE DISTRIBUTION OF ALL ANONYMOUS POLITICAL CAMPAIGN LITERATURE IS UNCONSTITUTIONAL ON ITS FACE

A. Ohio Revised Code §3599.09 Is Inconsistent With *Talley v. California* Because It Indiscriminately Bans The Distribution Of All Anonymous Political Campaign Literature

The Ohio Elections Commission has fined Margaret McIntyre solely for preparing and distributing anonymous political leaflets urging recipients to vote against a school tax levy. Her conduct has been found to be a violation of Ohio Revised Code §3599.09, which prohibits anonymous, election related leafletting and pamphleteering.

Ohio's statute prohibits every form of anonymous written communication pertaining to elections including any "notice, placard, dodger, advertisement, sample ballot, or any other form of general publication." It extends to anonymous printed or written communications "de-

signed to promote the nomination or election or defeat of a candidate, or to promote the adoption or defeat of any issue, or to influence the voters in any election."

The indiscriminate reach of the Ohio law is irreconcilable with this Court's reasoning in *Talley v. California*, 362 U.S. 60, which held that an ordinance prohibiting distribution of anonymous leaflets and pamphlets addressing "public matters of importance" is void on its face. *Id.* at 65. As this Court explained in *Talley*, the prohibition of anonymous leafletting is unconstitutional because "it would tend to restrict freedom to distribute information and thereby freedom of expression." *Id.* at 64. Specifically, people who wish to communicate their political views, but who fear retaliation, are likely to remain silent if they are compelled to disclose their identities.

In *Talley*, the defendant was arrested after he distributed a handbill that did not contain his name. It urged a boycott of certain merchants who sold goods manufactured by companies that allegedly engaged in employment discrimination. The handbill named the merchants that the defendant believed should be boycotted and said they should be boycotted because they carried the products of "manufacturers who will not offer equal employment opportunities to Negroes, Mexicans and Orientals." *Id.* at 61. Each of the handbills had a blank "which, if signed, would request enrollment of the signer as a 'member of the National Consumers Mobilization,'" an organization whose name and address appeared on the handbill. *Id.* Nonetheless, Talley was arrested, tried and convicted for violating a Los Angeles ordinance that prohibited the distribution of "any hand-bill in any place under any circumstances, which does not have printed on the cover, or the face thereof, the name and address of . . . (a) [t]he person who printed, wrote, compiled or manufactured [it] . . . [and] (b) [t]he person who caused the [handbill] to be distributed." *Id.* at 60-61.

This Court reversed Talley's conviction and fine of $10 on the ground that the sweeping identification requirement imposed by Los Angeles placed an impermissible restriction on constitutionally protected speech. The broad Ohio ordinance challenged in this case, like the "broad Los Angeles ordinance" struck down in *Talley*, *id.* at 65, is subject to the same infirmity.

B. Anonymous Leaflets Have Played An Important Role In The Nation's Political History By Facilitating The Expression Of Unpopular Views And Thereby Broadening The Scope Of Political Debate

Throughout history, anonymity has often been essential for political dissidents who faced persecution if their identities became known. Sometimes that persecution takes the form of official prosecution. Sometimes it takes the form of social ostracism. In either event, the ability to speak anonymously often provides a safe haven for those who wish to express unpopular views. As this Court observed in *Talley*: "Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind." 362 U.S. at 64.

This is particularly true during moments of high political tension when the tolerance for robust debate is often overwhelmed by the impulse toward political and enforced political orthodoxy. It is not, surprising, therefore, that the tradition of anonymous literature reached its apogee in this country during the period immediately surrounding the Revolutionary War. The tradition of anonymous political literature, however, was already well-established in England where "Defoe, Swift and Johnson, as well as many lesser known authors, published anonymous political pamphlets critical of affairs in England." Note, "The Constitutional Right to Anonymity: Free Speech, Disclosure and the Devil," 70 Yale L.J. 1084, 1085 (1961), citing Courtney, THE SECRETS OF

OUR NATIONAL LITERATURE 151-77 (1908).[4]

In America, "prominent persons used anonymous pamphlets and the unsigned letter to the editor to express their views on public issues." *Id.* at 1085. Pseudonymous political satires were common. *See* Bailyn, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 11 (1967). Indeed, as this Court pointed out in *Talley:*

> Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day [footnote omitted]. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names.

362 U.S. at 65.

The historical importance of protecting anonymous political publications has not diminished with time. One need look no further than George F. Kennan's landmark article formulating the foreign policy of containment of Soviet expansionism as the wisest way to address the problems of America's international relations with the U.S.S.R. Kennan, who was then a State Department official, published his article in the *Foreign Affairs* quar-

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[4] This caution was well-founded. The English Crown responded harshly to its critics. Those who could be identified faced severe punishment. *See generally* Chafee, THE BLESSINGS OF LIBERTY 190-207 (1956). In one particularly notorious example, "John Lilburne was whipped, pilloried and fined for refusing to answer questions designed to get evidence to convict him or someone else for the secret distribution of books in England." *Talley*, 362 U.S. at 65.

terly under the pseudonym of "X".[5] The policy proposed in that article became the basis of America's policy toward the Soviet Union in the decades that followed.

Similarly, in the realm of domestic politics, publications continue to appear under pseudonyms. For example, the inner workings of Chicago machine politics were revealed in a satirical book entitled THE ELECTION CHICAGO STYLE by Ward Heeler.[6] The book's introduction, written by a Chicago journalist, explained that Ward Heeler was the pseudonym of a prominent elected official who had to remain anonymous. "Were he to be discovered, his fellow politicos would speedily sentence him to political death. He would not be reslated for office, his years of achievement within the organization would be erased."[7]

Local community activists, like petitioner, do not face removal from office for expressing unpopular views. But the consequences of dissent can be even more daunting when dealing with local community politics where passions are frequently intense and personal relationships are more intimate. The dissent below underscored that concern, noting that:

> [I]t is possible that the very filing of the charge against McIntyre was in some measure in retaliation for her opposition to the school levy. Certainly, the timing of the filing is suspect. McIntyre distributed the leaflets in April 1988, but the complaint was not filed until one year later. According to McIntyre, in the intervening period the school levy had been defeated twice but succeeded on the third attempt shortly prior to the filing of the complaint. It would appear that as soon as the levy was safely passed, the school district, in the person of the assistant superintendent of elementary education, sought retribution against McIntyre for her opposition.

(Wright, J., dissenting)(Pet.App. A10). That is precisely the evil that this Court identified in *Talley* and that the First Amendment is designed to prevent.

C. The Protection For Anonymous Political Speech Recognized In Tally Is Supported By Overwhelming Precedent

Talley's protection of anonymous communication does not stand alone. This Court had recognized the relationship of anonymity to freedom of speech in other cases. The first such case was *Thomas v. Collins*, 323 U.S. 516. There, the Court invalidated the conviction of a union organizer for giving a speech advocating that listeners join his union without first registering with state authorities by obtaining an organizer's card. The Court overturned the conviction because the registration requirement punished the defendant for making a speech without first disclosing his identity to the State of Texas via the statutory registration requirement.

In *NAACP v. Alabama*, 357 U.S. 449 (1958), this Court addressed the danger of compelled disclosure of the names of NAACP members to state officials. In that case, the Court overturned a discovery order that required the NAACP to disclose membership lists to the Alabama Attorney General. The State had claimed that it was entitled to the lists as part of proceedings to enforce laws governing out-of-state corporations. This Court held that the compelled disclosure of NAACP membership lists violated the First Amendment right to political association because such disclosure would inter-

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[5] "The Sources of Soviet Conduct," 25 Foreign Affairs 566 (1947).

[6] Ward Heeler, THE ELECTION CHICAGO STYLE (1977).

[7] Walter Jacobsen, *Introduction* to *id.*

fere with the organization's efforts to disseminate its views:

> This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. When referring to the varied forms of governmental action which might interfere with freedom of assembly, it said in *American Communications Ass'n v. Douds*, *supra*, 339 U.S. [382] at page 402, 70 S.Ct. [674] at page 686 [(1950)]: 'A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature.' Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order.

Id. at 462.

This Court took similar positions in *Bates v. Little Rock*, 361 U.S. 516, and *Shelton v. Tucker*, 364 U.S. 479. *Bates* held that municipalities could not make disclosure of the names of NAACP members an automatic requirement for compliance with the municipalities' occupational license tax laws. This is because the compelled disclosure of names raised the prospect of "suppression or impairment [of First Amendment rights] through harassment, humiliation or exposure by government." 361 U.S. at 528 (Black, J., concurring). The Court made clear that, "[w]here there is such a significant encroachment upon personal liberty, the State may prevail only upon the showing of a subordinating interest which is compelling." *Id.* at 524. Similarly, in *Shelton v. Tucker*, decided a few months after *Talley*, this Court invalidated an Arkansas statute compelling every public school teacher to file an annual affidavit disclosing every organization to which the teacher had belonged or contributed to. According to *Shelton*: "Public exposure, bringing with it the

possibility of public pressures upon school boards to discharge teachers who belong to unpopular or minority organizations, would simply operate to widen and aggravate the impairment of constitutional liberty." 364 U.S. at 486-87.

This Court has been consistent in protecting citizens against government compelled disclosure of identity in other contexts, as well. For example, in *Lamont v. Postmaster General*, 381 U.S. 301, this Court invalidated a federal statute prohibiting an addressee from receiving mail determined to be foreign political propaganda unless the addressee first provided the postal service with a written statement in which the addressee identified himself and indicated his desire to receive the mail. According to the Court: "This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him." *Id.* at 307. *See also Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963).

This Term the Court reiterated the importance of the principle protecting against compulsory disclosure in *Department of Defense v. Federal Labor Relations Auth.*, __ U.S. __, 62 U.S.L.W. 4143 (Feb. 23, 1994). There the Court rejected a claim that the Freedom of Information Act justified compelling the government to disclose the home addresses of government employees to collective bargaining representatives. The Court observed: "Because a very slight privacy interest would suffice to outweigh the relevant public interest, we need not be exact in our quantification of the privacy interest. It is enough for present purposes to observe that the employees' interest in nondisclosure is not insubstantial." *Id.* at 4147.

The fear of reprisal generated by compulsory disclosure requirements has been a recurrent concern for contemporary political dissenters. The *Talley* Court acknowledged this concern when it observed that the rea-

son for its rulings in *Bates v. Little Rock*, 361 U.S. 516, and *NAACP v. Alabama*, 357 U.S. 449, "was that identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." 362 U.S. at 65. Its point was made with additional force in *Shelton v. Tucker*, where the Court addressed the adverse impact of compulsory disclosure of political affiliations by teachers:

> It is not disputed that to compel a teacher to disclose his every associational tie is to impair that teacher's right of free association, a right closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society. *De Jonge v. Oregon*, 299 U.S. 353, 364 [(1937)]; *Bates v. Little Rock*, *supra*, at 522-523. Such interference with personal freedom is conspicuously accented when the teacher serves at the absolute will of those to whom the disclosure must be made -- those who any year can terminate the teacher's employment without bringing charges, without notice, without a hearing, without affording an opportunity to explain.

364 U.S. at 485-86.

The same point was acknowledged in *Lamont* when the Court acknowledged the intimidating impact of the requirement that an addressee of "communist propaganda" identify himself by means of a written request in order to receive the mail: "The regime of this Act is at war with the 'uninhibited, robust, and wide open' debate and discussion that are contemplated by the First Amendment." 381 U.S. at 307, quoting *New York Times Company v. Sullivan*, 376 U.S. 254, 270 (1964).[8]

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[8] The lower courts also have been sensitive to the need for anonymity (continued...)

Talley v. California and the subsequent cases supporting the First Amendment right against compelled disclosure apply with undeniable force to petitioner McIntyre's case. At the time of her leafletting, she was a Westerville school district resident with school age children who was actively opposing a tax levy aggressively supported by school officials. As a consequence, whatever petitioner's motives for distributing unsigned leaflets, any parent publicly objecting to a tax levy could legitimately worry that such advocacy might cause opponents in the community to retaliate in some measure.

II. OHIO REVISED CODE §3599.09 CANNOT SURVIVE STRICT SCRUTINY

A. Ohio Revised Code §3599.09 Is A Regulation That Must Be Measured By The Compelling State Interest Test

According to the decisions of this Court, for the State of Ohio to justify its prohibition of anonymous "campaign literature pertaining to the adoption or defeat of a ballot issue," it must first establish that it has a compelling state interest in doing so. This Court has consistently held that any state law which regulates the fundamental rights of speech and press is invalid in the absence of a showing of a compelling state interest. Justice Harlan, concurring in *Talley*, explained:

> In judging the validity of municipal action affecting rights of speech or association protected against invasion by the Fourteenth Amendment, I do not believe that we can escape, as Mr. Justice Roberts said in

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[8] (...continued)
to protect litigants from possible retaliation. *See Doe v. Small*, 934 F.2d 743, 749 n.8 (1991), *superseded on other grounds*, 964 F.2d 611 (7th Cir. 1992). *See also Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981).

> *Schneider v. State*, 308 U.S. 147, 161 [(1939)], "the delicate balance and difficult task" of weighing "the circumstances" and appraising "the substantiality of the reasons advanced in support of the regulation of the free enjoyment of" speech. More recently we have said that state action impinging on free speech and association will not be sustained unless the governmental interest asserted to support such impingement is compelling.

362 U.S. at 66.

The same stringent standard of review was applied by this Court in *Meyer v. Grant*, 486 U.S. 414 (1988). There, a unanimous Court overturned a Colorado law making it a felony to pay persons for circulating petitions seeking the signatures necessary to trigger a referendum on a proposed law or state constitutional amendment. In upholding a lower court decision which invalidated the law, Justice Stevens explained: "We fully agree with the Court of Appeals' conclusion that this case involves a limitation on political expression subject to exacting scrutiny." *Id.* at 420.

This Court's most recent decision articulating the high burden of justification faced by Ohio in this case is *Burson v. Freeman*, 112 S.Ct. 1846. There the Court used the compelling state interest test to measure the constitutionality of a Tennessee law that prohibited the election day solicitation of voters within 100 feet of a polling place. In the course of upholding the statute, the Court explained that "a facially content-based restriction on political speech in a public forum . . . must be subjected to exacting scrutiny: The State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Id.* at 1851, quoting *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). *See also*

Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126-28 (1989); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).

There are sound reasons for measuring §3599.09 by the standard of strict scrutiny. First, §3599.09 is a regulation that chills core political speech by requiring speakers who feel the need for anonymity to identify themselves or to forego or modify their communication. For example, if Ward Heeler had been compelled to choose between identifying himself or not publishing his book, there would have been no book. *See* p.14, *supra*. At the local level in Ohio, every tax levy protestor now knows that he or she must comply with the identity requirement of §3599.09 or risk official punishment in the form of enforcement proceedings. Silence becomes the more attractive alternative.

Second, Ohio Revised Code §3599.09 must also be measured by the compelling state interest standard because it is a content based regulation. It compels pamphleteers to make their names and addresses part of their message when they advocate a particular outcome in an election. Such compulsion is an unconstitutional mode of content regulation because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781, 795 (1988). This is so because state regulation of the speaker's decision as to how she can best communicate her views is unconstitutional regulation of political communication. "The First Amendment protects [appellant's] right not only to advocate [her] cause but also to select what [she] believe[s] to be the most effective means for so doing." *Meyer v. Grant*, 406 U.S. at 424.

The First Amendment interests affected by legislatively compelled communication have also been addressed in *Miami Herald v. Tornillo*, 418 U.S. 241 (1974). There, the Court invalidated a statute granting candi-

dates a right to equal newspaper space to answer criticism and attacks made by the newspaper. The Court rejected the statute because it had the effect of regulating the content of the newspaper and would therefore have discouraged robust campaign related debate. According to the Court, ". . . under the operation of the Florida statute, political and electoral coverage would be blunted or reduced." *Id.* at 257.

To the extent that statutes, like §3599.09, are enforced in the absence of a compelling state interest, it is inevitable that they will have an adverse impact on the speech of private citizens who fear community disapproval or official retaliation.

B. The Ohio Supreme Court Applied A Relaxed Standard Of Review Because It Erroneously Analogized The §3599.09 Ban On Anonymous Leafletting In Public Places To Ballot Access And Voting Regulation

Instead of using the compelling state interest standard, the Ohio Supreme Court erroneously substituted the relaxed standard of review employed by this Court in some of its cases addressing the constitutionality of ballot access and voting regulations. Thus, it mistakenly reasoned:

> [I]n *Burdick v. Takushi* (1992), 504 U.S. __, 112 S.Ct. 2059, 119 L.Ed.2d 245, the [United States Supreme] [C]ourt, in upholding the ban on write-in voting instituted by the state of Hawaii, recognized a different standard. The court observed as follows:
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> "Election laws will invariably impose some burden upon individual voters. Each provision of a code, 'whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the

voting process itself, inevitably effects -- at least to some degree -- the individual's right to vote and his right to association with others for political ends.' *Anderson v. Celebrezze*, 460 U.S. 780, 788 [103 S.Ct. 1564, 1569-1570, 75 L.Ed.2d 547, 557] (1983). Consequently, *to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest*, as petitioner suggests, *would tie the hands of States seeking to assure that elections are operated equitably and efficiently*. See Brief for Petitioner 32-37. Accordingly, *the mere fact that a State's system 'creates barriers . . . tending to limit the field of candidates from which the voters might choose . . . does not of itself compel close scrutiny.' Bullock v. Carter*, 405 U.S. 134, 143 [92 S.Ct. 849, 856, 31 L.Ed.2d 92, 100] (1972); *Anderson, supra*, 460 U.S. at 788 [103 S.Ct., at 1569-1570, 75 L.Ed.2d, at 557]; *McDonald v. Board of Election Comm'nrs of Chicago*, 394 U.S. 802 [89 S.Ct. 1404, 22 L.Ed.2d 739] (1969)."

67 Ohio St.3d at 395, quoting *Burdick v. Takushi*, 504 U.S. __, 112 S.Ct. 2059, 2062-63 (1992)(emphasis added by the Ohio Supreme Court). (Pet.App. A6-A7). *But see Norman v. Reed*, 502 U.S. __, 112 S.Ct. 698, 705 (1992).

The source of the Ohio Supreme Court's erroneous use of a relaxed standard of review lies in its conclusion that §3599.09 is distinguishable from the ordinance in *Talley* because it can be treated as if it were an election law that "governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself . . . ." 67 Ohio St.3d at 395, quoting *Burdick v. Takushi*, 112 S.Ct. at 2063. (Pet.App. A6). In

fact, the Ohio Supreme Court mischaracterized §3599.09. The Ohio statute is not a statute governing the access of a candidate to the ballot. *Anderson v. Celebrezze*, 460 U.S. 780 (1983). It is not a statute governing the right of voters to write in the name of an unlisted candidate on the ballot. *Burdick v. Takushi*, 112 S.Ct. 2059. It is not a statute governing the fees to be charged candidates who seek to have their names listed on the ballot. *Bullock v. Carter*, 405 U.S. 134 (1972).

To the contrary, §3599.09 is a law that regulates distribution of political leaflets and pamphlets in public places to communicate views about the processes of government. It covers voters and people who cannot vote; it covers virtually anyone. As such, it regulates a pure form of speech that is entitled to the most rigorous protection that the First Amendment has to offer.

This Court repeatedly has underscored the high degree of First Amendment protection accorded to political leafletting in public places. It did so in *Talley* where it observed:

> In *Lovell v. Griffin*, 303 U.S. 444 [(1938)], we held void on its face an ordinance that comprehensively forbade any distribution of literature at any time or place in Griffin, Georgia, without a license. Pamphlets and leaflets, it was pointed out, "have been historic weapons in the defense of liberty" and enforcement of the Griffin ordinance "would restore the system of license and censorship in its baldest form." *Id.* at 452.

362 U.S. at 62. Justice Kennedy made a similar point in *International Society for Krishna Consciousness v. Lee*, 505 U.S. __, 112 S.Ct. 2711 (1992), when he observed that "[w]e have long recognized that the right to distribute flyers and literature lies at the heart of the liberties guaranteed by the Speech and Press Clauses of the First

Amendment." *Id.* at 2720 (Kennedy, J., concurring). *See also Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971).

There are important reasons for the Court's careful protection of leafletting and pamphleteering. They are the most basic means of political communication available to the average person. This is because:

> The pamphlet [George Orwell, a modern pamphleteer, has written] is a one-man show. One has complete freedom of expression, including, if one chooses, the freedom to be scurrilous, abusive, and seditious; or, on the other hand, to be more detailed, serious and "high-brow" than is ever possible in a newspaper or in most kinds of periodicals. At the same time, since the pamphlet is always short and unbound, it can be produced much more quickly than a book, and in principle, at any rate, can reach a bigger public. Above all, the pamphlet does not have to follow any prescribed pattern. It can be in prose or in verse, it can consist largely of maps or statistics or quotations, it can take the form of a story, a fable, a letter, an essay, a dialogue, or a piece of "reportage." All that is required of it is that it shall be topical, polemical, and short.[9]

Indeed, Professor Kalven once characterized leaflets and other inexpensive modes of political protest as equivalent "to the poor man's printing press." Kalven, "The Concept of the Public Forum," 1965 Sup.Ct.Rev. 1, 30.

Moreover, petitioner McIntyre's leafletting in the

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[9] George Orwell, *Introduction* in George Orwell and Reginald Reynolds, eds., British Pamphleteers (London, 1948-1951), I, 15, quoted in *Bailyn*, *supra* at p.2 (brackets in original).

present case has yet another claim to the greatest protection the First Amendment has to offer. Her leafletting communicated a political message about how citizens can best cast their votes on a public issue. She, therefore, was engaged in speech that is at the core of the First Amendment. As this Court stated in *Brown v. Hartlage*, 456 U.S. 45, 52 (1982): "At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed." Therefore, unlike voter and ballot access restrictions, regulation of the content of election related leaflets and other publications is regulation of the content of core political speech that cannot be measured by relaxed constitutional standards of review.

The central role of speech relating to election was reiterated in *Mills v. Alabama*, 384 U.S. 214 (1966), which invalidated a state statute imposing criminal penalties on the publication of election day newspaper editorials urging people to vote a certain way on an issue in a referendum. In that case, the editor of the *Birmingham Post-Herald* was convicted because his newspaper published an editorial that strongly urged readers to adopt the mayor-council form of government on the referendum ballot on the same day. The Court stated:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. The Constitution specifically selected the press, which includes not only newspapers, books and mag-

> azines, but also humble leaflets and circulars, *see Lovell v. City of Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 [(1938)], to play an important role in the discussion of public affairs.

384 U.S. at 218-19.

The Illinois Supreme Court reached the same conclusion in *Illinois v. White*, 506 N.E.2d 1284, when it invalidated a provision of the Illinois election code, similar to Ohio's, prohibiting distribution of anonymous political campaign literature. The Illinois court observed:

> "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." (*Garrison v. Louisiana* (1964), 379 U.S. 64, 74-75, 85 S.Ct. 209, 216, 18 L.Ed.2d 125, 133). In attempting to regulate political speech, this statute touches the core of first amendment values. (*Brown v. Hartlage* (1982), 456 U.S. 45, 52, 102 S.Ct. 1523, 1528, 71 L.Ed.2d 732, 740). The concerns expressed in *Talley* cannot be avoided by the expedient of banning only the most important type of anonymous speech and leaving untouched other forms of expression less central to the purposes of the first amendment.

Id. at 1287. *See also Wilson v. Stocker*, 819 F.2d 943 (10th Cir. 1987).

The Ohio Supreme Court's error in using a relaxed standard of review was compounded in this case because Mrs. McIntyre's leaflets advocated views about the proper outcome of a nonpartisan referendum on a school tax levy. They discussed no candidates; they named no individuals. Certainly, the dissemination of such leaflets a week prior to the referendum vote is protected by the basic conceptions at the foundation of the First Amend-

ment.

The distinctive constitutional protection applicable to political advocacy during the course of a nonpartisan referendum has been addressed by this Court in previous cases. In *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), this Court invalidated a Massachusetts criminal statute that prohibited corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." *Id.* at 768. It specified the high level of scrutiny applicable to speech pertaining to an issue on a referendum ballot:

> The constitutionality of §8's prohibition of the "exposition of ideas" by corporations turns on whether it can survive the exacting scrutiny necessitated by a state imposed restriction on freedom of speech. Especially where, as here, a prohibition is directed at speech itself [footnote omitted], and the speech is intimately related to the process of governing, "the State may prevail only upon showing a subordinating interest which is compelling," *Bates v. Little Rock*, 361 U.S. 516, 524 (1960); see *NAACP v. Button*, 371 U.S. 415, 438-39 (1963); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. at 463; *Thomas v. Collins*, 323 U.S. 516, 530 (1945), "and the burden is on the government to show the existence of such an interest." *Elrod v. Burns*, 427 U.S. 347, 362 (1976).

435 U.S. at 786.[10] This Court made the same point in

[10] The Ohio Supreme Court tried to avoid the holding in *Bellotti* by (continued...)

Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290 (1981), when it stated that campaign contribution limitations supporting advocacy related to ballot measures are burdens on political expression that are "always subject to exacting judicial scrutiny." *Id.* at 298.

C. Ohio Has Not Demonstrated A Compelling State Interest In A Flat Ban On The Distribution Of Anonymous Campaign Literature

The Ohio Supreme Court attempted to justify §3599.09 by asserting two interests. First, the Ohio Court found that "the disclosure requirement is clearly meant to 'identify those responsible for fraud, false advertising and libel.'" 67 Ohio St.3d at 394, quoting *Talley v. California*, 362 U.S. at 64. (Pet.App. A5). Second, it found that compliance with §3599.09 would enable voters to do a better job of evaluating the contents of political campaign communications if the communicators were identified. 67 Ohio St.3d at 395. Neither justification is

[10] (...continued)
citing to footnote 32 which suggests that an identification requirement might be imposed on political advertising by corporations that had a business interest in the outcome of a referendum election. 67 Ohio St.3d at 395. (Pet.App. A6). However, petitioner in this case is not engaged in paid political advertising and this case raises no issue of regulating large campaign expenditures. Mrs. McIntyre is a private citizen who has employed the device of the "humble leaflet." *Mills v. Alabama*, 384 U.S. at 219. Neither she nor any other private citizens who agree with the views expressed in her leaflets can be said to have a business interest in the outcome of the referendum affecting the schools where they send their children. Moreover, this Court has recognized that the states may have special latitude in regulating the campaign related activities of corporations because of the accumulations of wealth that are possible by virtue of state-conferred corporate status. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990).

sufficient to uphold Ohio's ban on all anonymous campaign literature.

The "fraud, false advertising, and libel" justification fails, most obviously, because §3599.09 is not confined to anonymous leaflets containing false or fraudulent statements. As this Court stated in *Talley*: "The ordinance is in no manner so limited, nor have we been referred to any legislative history indicating such a purpose." 362 U.S. at 64. To the contrary, as the syllabus of the Ohio Supreme Court's opinion makes clear, *see* n.3, *supra*, §3599.09 covers *all* "persons responsible for the production of [anonymous] campaign literature pertaining to the adoption or defeat of a ballot issue," whether or not the literature contains any false or fraudulent statements. Moreover, §3599.09 applies, whether or not the persons it covers arguably bear responsibility for "production" of the campaign literature. Indeed, under §3599.09, the printer of anonymous campaign literature can also fairly be held responsible for any false or fraudulent statements it might contain.

Moreover, insofar as it applies to anonymous, referendum related literature, the Ohio Supreme Court's reliance on the quote in *Talley* concerning "fraud, false advertising and libel" is misplaced. The Ohio courts cannot allow state officials to circumvent the central holding in *Talley* merely by invoking this phrase in talismanic fashion. If the state's general interest in curbing "fraud, false advertising and libel" were sufficient to justify a prophylactic ban on anonymous literature, then *Talley* itself would have to be reversed.

Even the Ohio Supreme Court did not go that far in this case. Instead, it concluded that concerns about "fraud, false advertising and libel" are magnified in the context of an election and that §3599.09 responds to that concern by banning anonymous campaign literature only in the context of a political campaign. (Pet.App. A5-A8). That conclusion, however, does not solve the

problem; it merely restates it. As the Illinois Supreme Court explained in *Illinois v. White*:

> Implicit in the State's . . . justification is the concern that the public could be misinformed and an election swayed by an eleventh-hour anonymous smear campaign to which the candidate could not meaningfully respond. The statute cannot be upheld on this ground, however, because it sweeps within its net a great deal of anonymous speech completely unrelated to this concern. In the first place, the statute has no time limit and applies to literature circulated two months prior to an election as well as that distributed two days before. The statute also prohibits anonymous literature supporting or opposing not only candidates but also referenda. A public question clearly cannot be the victim of character assassination.

506 N.E.2d at 1288.

Petitioner has no quarrel with narrowly drawn election laws that prohibit fraudulent campaign practices or "dirty tricks." *See* n.13, *infra*.[11] But "precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button*, 371 U.S. 415, 438 (1963). Furthermore, the need for "precision" is enhanced, not diminished, when the state attempts to regulate the core political speech about the outcome of a referendum. As this Court has frequently observed: "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."

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[11] *See also* 2 U.S.C. §432(e)(4), which provides that "a political committee which is not an authorized committee shall not include the name of any candidate in its name."

Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). In short, §3599.09 is fatally overbroad if conceived of as a fraud regulation, and thus cannot be sustained on those grounds.

For the same reason that "a public question clearly cannot be the victim of character assassination," 506 N.E. 2d at 1288, it does not pose opportunities for bribery or corrupt manipulation of candidates that justify contribution and reporting regulations in candidate elections. A referendum requires voters to take a position on inanimate policy matters. Unlike a candidate, a referendum cannot be a participant in the kind of *quid pro quo* transactions that lead to corruption. This point was articulated in *First National Bank of Boston v. Bellotti*, 435 U.S. at 790: "The risk of corruption perceived in popular elections . . . simply is not present in a popular vote on a public issue." This was underscored by Justice Stevens' concurring in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 678 (1990), where he observed that ". . . there is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other."

The second interest cited by the Ohio Supreme Court in support of §3599.09 is the interest in a better informed electorate. (Pet.App. A5-A6). Quoting a footnote from *First National Bank of Boston v. Bellotti*, 435 U.S. at 792 n.32, the Ohio Supreme Court ruled in this case that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." 67 Ohio St.3d at 395. (emphasis omitted)(Pet.App. A6).

The reliance on *Bellotti* is misplaced. *Bellotti* dealt with election related advertising by corporations. Even in that context, the Court's comments about disclosure were tentative. Of greater relevance to this case, the *Bellotti* Court was careful to point out that the state's

power to regulate the political speech of corporations that are themselves created by state law is distinct from the state's power to regulate the political speech of private individuals. 435 U.S. at 777-78.

The opinion below ignored that distinction entirely. It also ignored any potential distinction between candidates and noncandidates by indiscriminately endorsing an identification requirement that applies to all election related literature. It is arguable, at least, that a declared candidate for public office has a diminished interest in anonymous political speech related to the campaign. Conversely, the electorate has an enhanced interest in accurately understanding the candidate's political views, whether expressed directly or by those authorized to speak on the candidate's behalf. *See* 2 U.S.C. §441(d). A lone street corner pamphleteer, like petitioner, stands in a very different position, especially when the speech at issue is connected to a referendum campaign rather than a candidate election. Ohio's decision to merge all these issues together in a single prophylactic statute is constitutionally indefensible.

The First Amendment does not permit the state to regulate the content of political speech in such a broad and undifferentiated fashion, even if the state's goal is to assure a better informed electorate or to tone down the hyperbole of political debate. For example, it is inconceivable that the government could require speakers to discuss the weaknesses as well as the strengths of their political positions, even if "full disclosure" would lead to a better informed electorate. Such regulation is censorship in one of its simplest and boldest forms.

In addition it is counterproductive, as explained by the Illinois Supreme Court in *Illinois v. White*:

> By banning anonymity, the law deters many from expressing their opinions at all, resulting in the overall decrease in the flow of in-

> formation to the public. Far from creating a more informed electorate, the statute extinguishes sources of information. "A state's claim that it is enhancing the ability of its citizenry to make wise decisions by restricting the flow of information to them must be viewed with some skepticism." *Anderson v. Celebrezze* (1983), 460 U.S. 780, 798, 103 S. Ct. 1564, 1575, 75 L.Ed.2d 547, 564.

506 N.E.2d at 1288.

The Ohio Supreme Court's conclusion that laws banning anonymous campaign leaflets insure an informed electorate has also been previously considered and rejected in *People of the State of New York v. Duryea*, 351 N.Y.S.2d 978, *aff'd*, 354 N.Y.S.2d 129 (1st Dep't 1974). There, in the course of invalidating a New York statute similar to the statute at issue in this case, the *Duryea* court observed:

> Of course, the identity of the source is helpful in evaluating ideas. But "the best test of truth is the power of the thought to get itself accepted in the competition of the market" (*Abrams v. United States*, 250 U.S. 616, 40 S. Ct. 17, 63 L.Ed. 1173 (1919)(Holmes, J.)). Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is "responsible," what is valuable, and what is truth.

351 N.Y.S.2d at 996.

D. Ohio's Flat Ban On The Distribution Of Anonymous Election Related Leaflets And Other Publications Is Not Narrowly Tailored To Achieve Whatever Constitutionally Legitimate Interests That The State May Have

In addition to its other defects, §3599.09 is unconstitutional because it is not narrowly tailored to serve appropriate governmental interests. This is because it indiscriminately requires that all "persons responsible for the production of campaign literature pertaining to the adoption or defeat of a ballot issue identify themselves as the source." It covers virtually every campaign publication distributed during an election. It is not even confined to a specific time period before an election during which the anonymous communication is to be regulated.[12]

Burson v. Freeman, 112 S.Ct. 1846, contains one of this Court's most recent statements that regulation of the

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[12] By contrast, *Burson v. Freeman*, 112 S.Ct. 1846, was confined to electioneering on election day. Similarly, the identification provision contained in the federal statute regulating campaign expenditures also appears to be more limited than §3599.09, and not to be directed at lone, street corner leafletters like Mrs. McIntyre. Specifically, the identification requirement set forth in 2 U.S.C. §441(d) only applies in federal candidate elections (not to referenda). And, even then, it applies only in case of "express advocacy," a term that has been narrowly defined by this Court. *See Federal Election Comm'n v. National Conservative Political Action Committee*, 470 U.S. 480 (1985). Moreover, §441(d) is presumably not intended to apply to an individual who makes a *de minimis* cash expenditure to finance some leaflets protesting passage of a tax levy. *Buckley v. Valeo*, 424 U.S. 1 (1976). Finally, the statute appears to be limited by this Court's rulings that the disclosure requirements of federal law cannot be enforced in instances where there is a legitimate fear that disclosure may chill constitutionally protected speech. *See Brown v. Socialist Workers' 74 Campaign Committee*, 459 U.S. 87 (1982). The Ohio law, as drafted by the state legislature and interpreted by the Ohio Supreme Court, contains neither these constitutional limitations nor constitutional safeguards.

content of speech must be narrowly tailored to achieve compelling state interests if it is to withstand a constitutional challenge. There, this Court upheld a ban on election day campaigning within 100 feet of polling places only because it was narrowly tailored to promote the state interests in protecting against voter intimidation and election fraud. *Id.* at 1851. *See also Perry Education Ass'n v. Perry Local Education Ass'n*, 460 U.S. at 45.

To the extent that Ohio's flat ban on anonymous pamphleteering at all times and all places and under all circumstances is an effort at fraud prevention, it can hardly be said to meet the Constitution's requirement that it be narrowly tailored. According to *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. at 803, "[w]here core First Amendment speech is at issue, the State can assess liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made" (Scalia, J., concurring). Similarly, in *International Society for Krishna Consciousness v. Lee*, 112 S.Ct. at 2726, it was observed that "'[b]road prophylactic rules in the area of free expression are suspect.' *NAACP v. Button*, [*supra* at] 438 . . ., and more than a laudable intent to prevent fraud is required to sustain the present ban" (Souter, J., concurring).

Even if one hypothesizes that corruption of a referendum election could be accomplished by inundation of the community with leaflets presenting only one viewpoint, §3599.09 is not narrowly tailored to address this possibility. It prohibits all anonymous leaflets and contains no limitations protective of the street corner leafletter whose activities do not involve the minimum expenditure required to trigger the kind of disclosure requirement approved in *Buckley v. Valeo,* 424 U.S. 1 (1976). In short, §3599.09 does not confine itself to those activities that may potentially distort the electoral process.

Moreover, §3599.09 provides that the Ohio Secretary of State can make regulatory exceptions for campaign literature too small to allow space for the name and address of the distributor. This exception is limited to "printed matter and certain other kinds of printed communications such as campaign buttons, balloons, pencils, or like items, the size or nature of which makes it unreasonable to add an identification or disclaimer." Exceptions for miniature campaign literature hardly constitute the narrow tailoring required by *Burson* and *Perry*. To the contrary, if Ohio were truly committed to §3599.09 as a means of fraud prevention, it would not have provided for any exceptions at all.

Finally, the overbreadth of the challenged statute in this case as a fraud prevention measure is underscored by the fact that Ohio's election code has companion provisions specifically designed to prevent fraud and false statements. Section 3599.091(B) makes it an offense for any person, during the course of a campaign for public office "with intent to affect the outcome of such campaign" to make false statements about a candidate.[13]

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[13] Section 3599.091(B) provides: No person, during the course of any campaign for nomination or election to public office or office of a political party, by means of campaign materials, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:

(1) Use the title of an office not currently held by a candidate in a manner that implies that the candidate does currently hold that office or use the term "re-elect" when the candidate has never been elected at a primary, general, or special election to the office for which he is a candidate;

(2) Make a false statement concerning the formal schooling or training completed or attempted by a candidate; a degree, diploma, certificate, scholarship, grant, award, prize, or honor received, earned, or held by a candidate; or the period of time during which a candidate

(continued...)

Section 3599.092(B) states that "No person, during the course of any campaign in advocacy of or in opposition to the adoption of any ballot proposition or issue, by means of campaign material, [submitted to the voters] shall knowingly and with intent to affect the outcome of such campaign . . . (1) Falsely identify the source of a statement . . . [or] (2) Post, publish, circulate, distribute or otherwise disseminate a false statement . . . ."[14]

Thus, the terms of §3599.09 are not limited to punishment of wrongdoers, and the wrongdoers that can legitimately be punished are covered by other statutes.

III. OHIO REVISED CODE §3599.09 IS UNCONSTITUTIONAL AS APPLIED TO PUNISH DISTRIBUTION OF ANONYMOUS LEAFLETS OPPOSING PASSAGE OF A REFERENDUM ON A SCHOOL TAX LEVY

In addition to ignoring the facial invalidity of §3599.09, the Ohio Supreme Court also ignored the fact that the statute has been unconstitutionally applied to petitioner in this case. The unconstitutional application lies in the fact that Mrs. McIntyre's anonymous leaflets urged a vote against a tax levy and were neither fraudulent, libelous, nor false. Indeed, on the record in this case, the Ohio court did not and could not have found them to be so. Thus, the record is clear that distribution of her leaflets was a classic exercise of First Amendment

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[13] (...continued)
attended any school, college, community technical school, or institution;

(3) Make a false statement concerning the professional, occupational, or vocational licenses held by a candidate, or concerning any position the candidate date held for which he received a salary or wages;

(4) Make a false statement that a candidate or public official has been indicted or convicted of a theft offense, extortion, or other crime involving financial corruption or moral turpitude;

(5) Make a statement that a candidate has been indicted for any crime or has been the subject of a finding by the Ohio elections commission without disclosing the outcome of any legal proceedings resulting from the indictment or finding;

(6) Make a false statement that candidate or official has a record of treatment or confinement for mental disorder;

(7) Make a false statement that a candidate or official has been subjected to military discipline for criminal misconduct or dishonorably discharged from the armed services;

(8) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a candidate by a person or publication;

(9) Make a false statement concerning the voting record of a candidate or public official;

(10) Post, publish, circulate, distribute, or otherwise disseminate a false statement, either knowing the same to be false or with reckless disregard of whether it was false or not, concerning a candidate that is designed to promote the election, nomination, or defeat of the candidate. As used in this section, "voting record" means the recorded "yes" or "no" vote on a bill, ordinance, resolution, motion, amendment, or confirmation.

[14] Section 3599.09.2(B): No person, during the course of any campaign in advocacy of or in opposition to the adoption of any ballot proposition or issue, by means of campaign material, including sample ballots, an advertisement on radio or television or in a newspaper or periodical, a public speech, a press release, or otherwise, shall knowingly and with intent to affect the outcome of such campaign do any of the following:

(1) Falsely identify the source of a statement, issue statements under the name of another person without authorization, or falsely state the endorsement of or opposition to a ballot proposition or issue by a person or publication;

(2) Post, publish, circulate, distribute, or otherwise disseminate, a false statement, either knowing the same to be false or acting with reckless disregard of whether it was false or not, that is designed to promote the adoption or defeat of any ballot proposition or issue.

freedom. "Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Talley v. California*, 362 U.S. at 64 (quoting *Lovell v. Griffin*, 303 U.S. at 452).

Because Mrs. McIntyre's leafletting was pure speech, no statute can legitimately punish it. Thus, even if §3599.09 were valid on its face, it could not be used to punish petitioner simply for handing out unsigned leaflets urging voters to vote against a tax increase. Her advocacy cannot be said to be either false or libelous. As this Court said in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), "under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Id.* at 339-40. Similarly, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), makes clear that the only way that any legal sanctions can be imposed on the communication of a viewpoint is when that communication unmistakably includes a libelous statement of fact.

The teachings of *Gertz* and *Milkovich* are particularly applicable to this case because petitioner's leaflets addressed voters in a nonpartisan referendum. Her leaflets, which apparently infuriated Westerville school officials, merely communicated her opposition to passage of a school tax levy because, in her opinion, school officials were wasting taxpayer funds and were not keeping voters appropriately informed. The leaflets also complained that school officials ignored the advice of a citizens' commission to school officials about school boundaries. Such criticisms of public officials are hardly unique to petitioner's case. They are characteristic of virtually every election related debate and can not be punished or discouraged in a way that is consistent with the First

Amendment. As Justice Rehnquist pointed out in *Hustler Magazine v. Falwell*, 485 U.S. 46, 51 (1988):

> The sort of robust political debate encouraged by the First Amendment is bound to produce speech that is critical of those who hold public office or those public figures who are "intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large." *Associated Press v. Walker*, decided with *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 164, 87 S.Ct. 1975, 1996, 18 L.Ed.2d 1094 (1967)(Warren, C.J., concurring in result).

If school officials were offended by anything petitioner said about the referendum, their recourse was in the marketplace of ideas, not the Ohio election code. In fact, there is evidence in the record that on at least one occasion they attempted to explain to the public why they believed Mrs. McIntyre's position was mistaken. (J.A.15). Their obligation to rely on public debate rather than legal sanctions to remedy their distaste for petitioner's statement is made clear in *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290. There, this Court held that the First Amendment provides a distinctive degree of protection for citizen participation in referendum campaigns. Chief Justice Burger made clear that contribution restrictions that are designed to protect candidates against the evils of corruption and undue influence can not constitutionally be applied to ballot measures. *Id.* at 297-98. In his view, ballot measures are not subject to either evil. *Id.* at 298.

By applying §3599.09 to punish petitioner's speech, the Ohio Court exceeded its constitutional authority.

CONCLUSION

For the reasons set forth above, petitioner Margaret McIntyre requests that this Court reverse the decision of the Ohio Supreme Court that §3599.09 is constitutional on its face and as applied.

Respectfully submitted,

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Dated: April 18, 1994

(5)

No. 93-986

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

MARGARET MCINTYRE,

Petitioner,

v.

OHIO ELECTIONS COMMISSION,

Respondent.

MOTION TO SUBSTITUTE EXECUTOR JOSEPH MCINTYRE AS THE PROPER PARTY IN THIS CASE

MEMORANDUM IN SUPPORT OF MOTION TO SUBSTITUTE EXECUTOR AND IN OPPOSITION TO THE OHIO ELECTIONS COMMISSION'S MOTION TO DISMISS THE CASE

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No. 93-986

IN THE
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October Term, 1993

MARGARET McINTYRE,

Petitioner,

v.

OHIO ELECTIONS COMMISSION,

Respondent.

MOTION TO SUBSTITUTE EXECUTOR JOSEPH MCINTYRE AS THE PROPER PARTY IN THIS CASE

Joseph McIntyre, executor of the estate of Defendant-Petitioner Margaret McIntyre, hereby moves this Court for an order substituting him as the Defendant-Petitioner in the above entitled case. This motion is made pursuant to Rule 35.1 of this Court because Margaret McIntyre died on or about May 6, 1994, and the Probate Court of Franklin County appointed Joseph McIntyre as executor on May 20, 1994.

Respectfully submitted,

David Goldberger

David Goldberger 0010292
Counsel for Petitioner

No. 93-986

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

MARGARET McINTYRE,

Petitioner,

v.

OHIO ELECTIONS COMMISSION,

Respondent.

MEMORANDUM IN SUPPORT OF MOTION TO SUBSTITUTE EXECUTOR AND IN OPPOSITION TO THE OHIO ELECTIONS COMMISSION'S MOTION TO DISMISS THE CASE

I. BACKGROUND OF THIS MOTION

On February 22, 1994, this Court granted Margaret McIntyre's petition for certiorari to review the constitutionality of Section 3599.09 of the Ohio Election Code, which prohibits distribution of political campaign leaflets that do not contain the name and address of the leafletter. Mrs. McIntyre had previously been fined $100 by the Ohio Elections Commission for distributing a leaflet opposing passage of a referendum proposal to increase property taxes. Petitioner sought review in this Court on the ground that the decision of the Ohio Supreme Court sustaining

her fine under Section 3599.09 was inconsistent with this Court's decision in *Talley v. California* 362 U.S. 60 (1960). Margaret McIntyre died on May 6, 1994.

Joseph McIntyre, the executor of Margaret McIntyre's estate, makes his motion to substitute as the party in this case pursuant to Rule 35.1 of this Court which provides that: "In the event a party dies after filing a notice of appeal to this Court, or after filing a petition for writ of certiorari, the authorized representative of the deceased party may appear and, upon motion, be substituted as a party to this proceeding." Movant is the duly appointed executor of the estate of Margaret McIntyre. He was appointed following the death of Mrs. McIntyre. (Ex.A) A motion to substitute him as the proper party in this case pursuant to Rule 25 of the Ohio Rules of Civil Procedure is currently pending before the trial court.[1]

The executor's motion should be granted because, on December 9, 1994, a final civil judgment in this case was entered against Petitioner Margaret McIntyre fining her $100 plus court costs for distributing a political leaflet that did not contain her name and address. (J.A.53) The judgment, which was entered pursuant to the mandate of the Ohio Supreme Court upholding the constitutionality of section 3599.09, was then stayed pending the outcome of proceedings in this Court. (J.A.55) The December 9th judgment imposed a civil debt comprised of both the fine and the court costs. Absent the current stay, the debt would be collectable from Petitioner's estate.

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1. A ruling is expected shortly. Counsel for Petitioner and Petitioner's executor will inform this Court of the disposition of the motion to substitute below as soon as the Franklin County Court of Common Pleas rules.

II. THE MOTION TO DISMISS THIS CASE SHOULD BE DENIED

Notwithstanding the fact that the fine and court costs have created a civil debt payable by the Petitioner's estate, the Ohio Elections Commission now makes a unilateral attempt to moot this case on the ground that the Commission has now chosen not to collect the fine. According to its motion, the Commission asserts that this case is now moot because the Commission intends to make "no further attempts . . . either to pursue this case or to collect the fine imposed." (Resp. Motion to Dismiss p. 2.)

In making its motion to dismiss this appeal, the Commission relies solely on its unilateral choice not to collect the fine made after the petition for certiorari in this case had been granted. The Commission makes no claim that the civil fine abates on the death of a party. Indeed, on May 24, 1994, during argument in the Franklin Court of Common Pleas, the Commission explicitly stated that it was not asserting that the fine abated because of the Petitioner's death. Instead it asserted that the case was moot because of the Commission's unilateral choice not to collect it:

> Mr. Sutter: . . . We also argue, your honor, that the case became moot. This is a circumstance where Margaret McIntyre has died. It was a fine imposed against her for her conduct. There is no longer an outstanding fine.
>
> Mr. Goldberger: Is it the State's position, so I'm clear, that all civil fines abate on the death of a party?
>
> Mr. Sutter: No. It is not. We are not even suggesting that. What we are suggesting is that

> under these circumstances, in light of the amount involved, in light of the circumstances, that the Ohio Elections Commission decided that it did not want to pursue the fine. (Ex. B)

The Commission's mootness contention is mistaken. It does not have the power to moot a case unilaterally by refusing to collect the civil fine that remains enforceable pursuant to a valid civil judgment. A controversy remains between the parties because of that judgment and because of the collateral consequence that the judgment also obligates Petitioner's estate to pay court costs.[2]

Indeed, there is no legal barrier prohibiting the Commission from changing its mind and collecting the fine. Thus, to the extent that the fine has been imposed pursuant to an unconstitutional statute, the discretionary refusal to collect it is nothing more than a temporary cessation of the unlawful enforcement of an unconstitutional statute in order to avoid the risk of an unfavorable ruling by this Court. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1951).

In addition, even if the Commission honors its exercise of unilateral discretion and never collects the fine, under Ohio law, Petitioner's estate must pay the court costs. *Ohio v. McGettrick*, 31 Ohio St. 3d 138, 141 n.4, 509 N.E. 2d 378,381 n.4 (1987). See also *Wetzel v. Ohio*, 371 U.S. 62 (1962) (Douglas, J., concurring). The Commission's decision to forego collection of the fine does not abate the final judgment entered in this case and, therefore, has no effect on the liability of Petitioner's estate for court costs imposed pursuant to a valid and unabated judgment. *Ohio v. McGettrick*; *supra*. Such costs remain a collateral

2. In fact, prior to her death, Petitioner established a trust which provided for the payment of the fine in the event of her death, if there were an unfavorable outcome in this Court.

consequence of the final judgment that has been entered below. See *Sibron v. New York*, 392 U.S. 40, 57 (1968). Under such circumstances, proceedings in this Court do not abate. This was recognized in *Wetzel v. Ohio*, 371 U.S. 62 (1962), in which this Court refused to dismiss an appeal from the Ohio courts because the defendant in that case had died. In *Wetzel*, following the defendant's death, this Court substituted the administrator of a deceased criminal defendant's estate as the party in that case.[3]

The obligation to pay court costs is unaffected by the Commission's unilateral decision not to collect the fine in this case because the costs are payable to the state courts. The judgment against the Petitioner will remain in effect unless reversed by this Court, and Petitioner's estate will remain liable for costs. Therefore, because costs have been imposed pursuant to a judgment with ongoing validity, they constitute the very collateral consequences that defeat any claim of mootness. *Sibron v. New York, supra*. In short, unlike the fine, the costs are not waivable by the Commission.

To grant the Commission's motion to dismiss this case would establish the principle that the government has uncontrolled discretion to moot a case pending before this Court any time that it unilaterally chooses to waive enforcement of a judgment in its favor. This would be true whether or not the party died. According to the Commission, the waiver of the fine rather than the death of the Petitioner moots this case. Such unfettered discretion would be most likely to be exercised whenever a government lawyer concluded that the state had a weak case.

Indeed, if the Commission in this case can succeed in mooting this case by choosing not to collect the $100 fine, it remains free to enforce or to threaten enforcement of its

3. The appeal was dismissed on the merits for want of a substantial federal question.

constitutionally suspect statute in future cases. Loss of a $100 fine is a small price for the Commission to pay in order to protect itself against the possibility that this Court may invalidate the statute at issue in this case.

Moreover, it is clear that, under Ohio law, Petitioner's death does not moot or abate this case. In *Ohio v. McGettrick*, 31 Ohio St.3d 138, 509 N.E.2d 378 (1987), the Ohio Supreme Court held that a criminal appeal survives the death of the Defendant-Appellant. There it stated:

> When a criminal defendant-appellant dies while his appeal is pending and, subsequently, within a reasonable time, a personal representative of the decedent is appointed, that representative may be substituted as a party on motion by the decedent's representative or the state under the then existing style of the case and the court of appeals shall proceed to determine the appeal.

31 Ohio St.3d at 138. Similarly, in *Porter v. Lerch*, 127 Ohio St. 47, 193 N.E. 766 (1934), the Ohio Supreme Court held that civil actions survive the death of a party, particularly after entry of a final judgment creating a civilly enforceable obligation. See also *Wetzel v. Ohio*, 371 U.S. 62 (1962).

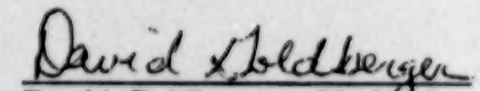
Because Ohio law does not moot or abate this appeal, a decision by this Court granting the Commission's motion to dismiss would strip the Petitioner's executor of any defense against any future effort to collect the fine or the costs, even though the judgment appears to be based on an unconstitutional statute.

III. CONCLUSION

For the foregoing reasons, the executor of Petitioner's estate requests (1) that this Court grant his motion to substitute as

the party in this case and (2) that this Court deny the Ohio Elections Commission motion to dismiss this case.

Respectfully submitted,



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93-986

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

MARGARET MCINTYRE,

Petitioner,

v.

OHIO ELECTIONS COMMISSION,

Respondent.

RESPONDENT OHIO ELECTIONS COMMISSION'S MOTION TO DISMISS UPON SUGGESTION OF DEATH OF PETITIONER MARGARET MCINTYRE

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RESPONDENT'S MOTION TO DISMISS UPON SUGGESTION OF DEATH OF PETITIONER MARGARET MCINTYRE

This controversy stems from an enforcement proceeding before Respondent Ohio Elections Commission. Respondent determined after a hearing that Petitioner Margaret McIntyre had violated Ohio elections law, Ohio Rev. Code § 3599.09, which requires campaign literature to contain the name and address of the person circulating it and prohibits this attribution statement from being misleading. Respondent thus levied a $100 fine against Petitioner, which is the penalty provided by statute. Petitioner appealed the imposition of this fine through the Ohio state courts, where it was upheld, and ultimately sought review in this Court, which granted certiorari on February 22, 1994. To this date, the fine has never been collected from Petitioner.

On May 10, 1994, counsel for Respondent learned that Petitioner Margaret McIntyre had died. Pursuant to Supreme Court Rule 35.1:

> In the event a party dies after filing a . . . petition for a writ of certiorari, the authorized representative of the deceased party may appear and, upon motion, be substituted as a party to the proceeding. If the representative does not voluntarily become a party, any other party may suggest the death on the record and on motion seek an order requiring the representative to become a party within a designated time. If the representative then fails to become a party, the party so moving, if a respondent . . . , shall be entitled to have the petition for a writ of certiorari . . . dismissed or the judgment vacated for mootness, as may be appropriate.

After learning of Petitioner's death, counsel for Respondent immediately contacted the members of the Ohio Elections Commission and inquired whether they would seek to pursue this case, and the collection of the fine imposed on Petitioner, any further. In light of the fact that the only matter at issue in this case was the legality of Petitioner's conduct and the propriety of the fine imposed for what were adjudged to be violations of Ohio law, the Commission members concluded that to pursue collection from Ms. McIntyre's estate would be certainly inappropriate and perhaps even improper. They thus instructed counsel for Respondent to inform this Court that no further attempts would be made either to pursue this case or to collect the fine imposed.

In light of the Commission's position, it appears that rather than permitting a representative to be substituted for Petitioner in this case, this action has become moot and should be dismissed. *See, e.g., American Tobacco Co. v. United States,* 328 U.S. 781, 815 n.11 (1946) (petition of certiorari dismissed upon death of petitioner who was seeking relief from fine imposed for violation of the Sherman Act). This appears to be the Court's standard practice in cases involving punishments imposed for alleged violations of law upon the death of the individual. *See, e.g., United States v. Green,* ___ U.S. ___, 113 S. Ct. 1835 (1993) (certiorari dismissed); *Mintzes v. Buchanan,* 471 U.S. 154 (1985) (same); *Hampton v. Ditty,* 414 U.S. 885 (1973) (same). By contrast, the Court permits substitution and continues a pending case where the deceased party was seeking compensatory damages and any such right or obligation would survive the party's death. *See, e.g., Farmer v. Carpenters,* 430 U.S. 290 (1977). Such is not the case here.

In addition, this case cannot properly be considered to fall within the exception to mootness for situations that are "capable of repetition, yet evading review." This is not a situation where there exists "a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein v. Bradford,* 423 U.S. 147, 149 (1974). Nor is it a potentially recurring situation where the temporary nature of facts essential to the controversy would consistently defeat review, as in election or abortion cases. *See, e.g., Democratic Party v. Wisconsin,* 450 U.S. 107, 115 n.13 (1981); *Roe v. Wade,* 410 U.S. 113, 125 (1973). In this case, the matter arose from the fine imposed upon Petitioner by Respondent for her alleged violation of Ohio law, and that controversy has now abated with her death.

As this case has come to this Court from the state courts, the proper disposition here would be to dismiss the petition for a writ of certiorari and leave it to the state courts either to declare the matter abated or to take whatever other action they deem proper according to the applicable jurisdictional principles under state law. *See, e.g., Hampton, supra* (certiorari dismissed); *Pennsylvania v. Linde,* 409 U.S. 1031 (1972) (same); *Miller v. Ohio,* 404 U.S. 1011 (1972) (same).[1]

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[1] As an alternative disposition, Respondent would suggest that the Court could simply dismiss the writ as improvidently granted, as it has done in other recent cases in which the Court determined that its resolution of constitutional questions may be entirely hypothetical. *See, e.g., Ticor Title Ins. Co. v. Brown,* ___ U.S. ___, 114 S. Ct. 1359 (1994). It is unclear, however, that this disposition differs in any pertinent respect from a bare dismissal of certiorari, as the Court has done in other cases similar to this one upon the death of the individual party.

Consequently, Respondent urges this Court to dismiss the petition for a writ of certiorari in this case.

Respectfully submitted,

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June 24, 1994

(11)

No. 93-986

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

MARGARET MCINTYRE,
Petitioner,

v.

OHIO ELECTIONS COMMISSION,
Respondent.

On Petition for a Writ of Certiorari
to the Supreme Court of Ohio

BRIEF OF RESPONDENT

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QUESTION PRESENTED

Does Ohio Rev. Code §3599.09(A), an election law disclosure statute designed to prevent fraud and provide the voting public with a limited amount of pertinent information, violate the First and Fourteenth Amendments to the Constitution of the United States?

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STATEMENT OF THE CASE

In 1988, Petitioner Margaret McIntyre opposed passage of a property tax levy for the Westerville, Ohio school district. She prepared, or had prepared, flyers expressing this opposition.

Instead of placing her name and address on these flyers as required by Ohio Rev. Code §3599.09(A) (the "Disclosure Statute"), Petitioner identified those responsible for the flyers as "Concerned Parents and Tax Payers," Joint Appendix ("J.A.") 6-7, a fictitious organization. J.A. 38-39. She distributed these flyers at two separate meetings that were scheduled as open forums for the public to discuss the tax levy. J.A. 14-15.

On each occasion, an assistant school superintendent observed Petitioner distributing the flyers. *Id.* On the first occasion, he cautioned that her failure to include her name and address on them violated Ohio elections law. J.A. 28. Petitioner, however, ignored his cautions. At no time did anyone attempt to prevent her from circulating any literature, nor did anyone seek to prevent her from attending either meeting. Petitioner also was never threatened with any reprisals because of her opposition to the tax levy.

The assistant superintendent eventually filed a complaint with Respondent, the Ohio Elections Commission ("Commission"), alleging that Petitioner had violated the Disclosure Statute, among other provisions of Ohio elections law. J.A. 3, 14-16. At a full hearing conducted by the Commission in a civil enforcement action, evidence was presented that some of Petitioner's flyers did contain the disclosure statement required by Ohio Rev. Code §3599.09(A), and Petitioner testified that she had intended to disclose this same information on all the flyers, though she had failed to do so. J.A. 36-39. It was also revealed that no such organization as "Concerned Parents and Tax Payers" had ever existed. J.A. 38-39. After considering all the evidence, the

Commission found that Petitioner had violated the Disclosure Statute and fined her $100. J.A. 42.

At the hearing and in the Commission's order, the viewpoint contained in the flyers, which expressed Petitioner's anti-levy message, was never considered with respect to any of the issues that were raised and determined. Instead, the sole focus was on whether the flyers included an attribution statement and whether any such statement was false or fraudulent as provided in Ohio Rev. Code §3599.09. *See* J.A. 26-42.

On appeal from this administrative order, an Ohio trial court ruled that Ohio Rev. Code §3599.09(A) was unconstitutional. J.A. 45. A state appeals court upheld the law and reversed. J.A. 49.

Petitioner then took an appeal to the Supreme Court of Ohio, which analyzed her challenge to the Disclosure Statute under the established test for evaluating the constitutionality of election laws crafted in *Anderson v. Celebrezze*, 460 U.S. 780 (1983). *See McIntyre v. Ohio Elections Comm'n*, 67 Ohio St.3d 391 (1993), Appendix to Petition for Writ of Certiorari, A1-A15. That test requires a reviewing court to weigh any burden that the challenged legislation places on First Amendment rights against the legitimate interests of the State in regulating the subject matter involved. The Ohio Supreme Court conducted this balancing test and concluded that the Disclosure Statute places only a modest burden on First Amendment rights, which is outweighed by Ohio's proper interests in the deterrence of fraud, misleading advertising, and libel, and in requiring disclosure to the public of specific information that is pertinent to the electoral process. Consequently, the Ohio Supreme Court affirmed the appeals court's holding that the Disclosure Statute is constitutional. Petitioner then sought a writ

of certiorari from this Court, which granted review on February 22, 1994.[1]

SUMMARY OF ARGUMENT

1. The court below properly applied the test established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), to analyze the constitutionality of an elections measure such as the Disclosure Statute. Under that test, a reviewing court must weigh any burden the challenged legislation places on First Amendment rights against the legitimate interests of the State in regulating the subject matter involved. Here the Disclosure Statute imposes only a modest burden, if any, on First Amendment rights. This modest burden is substantially outweighed by the State's legitimate interests in the deterrence of fraud, misleading advertising, and libel, and in requiring the disclosure to the public of specific information that is pertinent to the electoral process.

2. *Talley v. California*, 362 U.S. 60 (1960), is inapplicable to this case. *Talley* specifically left for another day whether a measure such as the Disclosure Statute, which is designed to deter fraud, misleading advertising, and libel, is constitutional. In addition, *Talley* did not involve an election law requiring the Court to weigh two competing interests of equal constitutional magnitude -- protecting the right to vote by preserving the integrity of the electoral process and assuring freedom of speech. The States are

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[1] Petitioner died while this case was being briefed in this Court, and Respondent moved to dismiss certiorari under the holding in *American Tobacco Co. v. United States*, 328 U.S. 781, 815 n.11 (1946). On June 13, 1994, the Court granted a motion to substitute parties and denied the motion to dismiss, either rejecting outright or else deferring consideration of the issue whether under these circumstances this case should be correctly understood to be moot. If the Court intended the latter, then Respondent would ask to incorporate by reference the discussion of mootness that was contained in its filings on those motions.

authorized to act to protect the integrity of the electoral process, even when First Amendment rights are implicated, as long as any such action does not discriminate against the viewpoint expressed in any political message.

3. Even if strict scrutiny were to be applied here, however, the Disclosure Statute would withstand such scrutiny because it advances the State's compelling interest in combatting fraud in the electoral process. The Disclosure Statute, moreover, is narrowly drawn to serve that compelling state interest. *Burson v. Freeman*, ___ U.S. ___, 112 S. Ct. 1846 (1992).

4. Disclosure statutes have long been upheld by this Court in many different fields, even where they impose some burden on First Amendment activities. In the field of elections law in particular, the Court's precedents confirm the constitutionality of disclosure statutes in elections both for candidates and for ballot issues. *See Buckley v. Valeo*, 424 U.S. 1 (1976); *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). The same result also holds for disclosure statutes that affect such First Amendment activities as lobbying, *United States v. Harriss*, 347 U.S. 612 (1954), and charitable solicitations, *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S 781 (1988). Any countervailing interest in maintaining secrecy or anonymity is less powerful than Petitioner alleges, and must yield to the State's compelling interests in requiring the disclosure of a limited amount of pertinent information to the public. In this case, for example, any burden allegedly imposed on Petitioner's First Amendment rights by the Disclosure Statute was either minimal or nonexistent, and the State has a compelling interest in requiring the limited disclosures specified in Ohio Rev. Code §3599.09(A).

ARGUMENT

INTRODUCTION

The right to vote is as important to our democratic system of government as any protected by the First Amendment. "Preserving the integrity of the electoral process, preventing corruption, and 'sustaining the active, alert responsibility of the individual citizen in a democracy' ... are interests of the highest importance." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-89 (1978) (citation omitted). "To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of those schemes ... inevitably affects -- at least to some degree -- the individual's right to vote and his right to associate with others for political ends," which is justified by "the State's important regulatory interests." *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

Ohio has a comprehensive regulatory scheme designed to protect the electoral process by preventing fraud upon the voters and maintaining an educated voting public. The statutes that make up this regulatory scheme operate in concert to promote honesty in the electoral process without interfering with robust debate and the free flow of ideas.

The provision of Ohio's elections laws at issue in this case, Ohio Rev. Code §3599.09(A), is similar to statutes found in many other States.[2] It is a viewpoint-neutral election regulation, *see, e.g.*, *Burson v. Freeman*, ___ U.S. ___, 112 S. Ct 1846, 1859

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[2] These statutes include, for example: Ariz. Rev. Stat. Ann. §§ 19-128, 16-912 (West Supp. 1993) (requiring disclosure and attribution for sponsors of printed campaign materials and campaign broadcast advertising); Mich. Comp. Laws Ann. § 169.247 (West Supp. 1994) (same); Mo. Rev. Stat. § 130.031 (West Supp. 1994) (same); N.H. Rev. Stat. Ann. § 664:14 (Butterworth Supp. 1993) (same); Tenn. Code Ann. § 2-19-120 (Michie Supp. 1993) (same).

(1992) (Scalia, J., concurring), that does not "grant[] to one side of a debatable public question ... a monopoly in expressing its views." *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (plurality opinion, quotation omitted). Ohio Rev. Code §3599.09(A) merely requires the sponsor of mass-produced campaign literature to place his or her name and address on that literature and prohibits the "attribution statement" from being false or fraudulent.

Petitioner argues that the Disclosure Statute violates the First Amendment because it required her to take responsibility for her actions and identify, as her own, campaign literature she produced and circulated with the intention of influencing the outcome of an issue election. The Disclosure Statute, however, does not unconstitutionally burden speech that is protected by the First Amendment. This constitutional challenge to Ohio Rev. Code §3599.09(A) must therefore be rejected.

I. OHIO REV. CODE §3599.09(A) IS A CONSTITUTIONAL ELECTIONS MEASURE BECAUSE IT IMPOSES ONLY A MODEST BURDEN ON FIRST AMENDMENT RIGHTS THAT IS OUTWEIGHED BY THE STATE'S LEGITIMATE INTERESTS IN PREVENTING FRAUD, MISLEADING ADVERTISING, AND LIBEL, AND IN REQUIRING THE DISCLOSURE OF LIMITED INFORMATION THAT IS SIGNIFICANT TO A CITIZEN'S EXERCISE OF THE RIGHT TO VOTE

A. The Proper Test for Analyzing the Constitutionality of an Election Measure Such as Ohio Rev. Code §3599.09(A) Was Established in *Anderson v. Celebrezze*.

"As a practical matter, there must be a substantial regulation of elections if they are going to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974). For the most part, this regulation is left to the States. *See Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) ("framers of the constitution intended to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections").

A State's regulation of elections "inevitably affects" and imposes some burden on an individual's constitutional rights. *Anderson*, 460 U.S. at 788. But to subject every election regulation to strict scrutiny and require that every regulation be narrowly tailored to advance a compelling state interest "would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick v. Takushi*, ___ U.S. ___, 112 S. Ct. 2059, 2063 (1992). Consequently, the Court has noted that "[c]onstitutional challenges to specific provisions of a State's election laws ... cannot be resolved by any 'litmus paper test....'"

Anderson, 460 U.S. at 789 (*quoting Storer*, 415 U.S. at 730). Instead, the proper test is this:

> A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State....
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights.

Burdick, 112 S. Ct. at 2063 (*quoting Anderson*, 460 U.S. at 789). Petitioner's attack on Ohio Rev. Code §3599.09(A) must be considered within the framework of this test, which the Supreme Court of Ohio properly employed in the decision on review here.

Petitioner, however, contends that the Disclosure Statute has nothing to do with elections because it does not govern any access of candidates to the ballot, but instead concerns the distribution of political leaflets. *See* Brief for Petitioner at 22-29. This contention is plainly incorrect. By its terms, Ohio Rev. Code §3599.09(A) applies only to campaign literature designed "to influence the voters in any election," and only requires that such literature be correctly attributed to its sponsor. *Id*. This provision is just as much an elections measure as the requirement in the very next subsection of the statute that any radio or television advertisement designed "to influence the voters in any election" must identify either the speaker or the financial sponsor of the advertisement. Ohio Rev. Code §3599.09(B). It is also just as much an elections measure as attribution requirements in campaign finance legislation, *see, e.g.*, Ohio Rev. Code §3517.10 (requiring disclosure of names and addresses of political contributors and

itemization of all contributions and expenditures); Ohio Rev. Code §3517.081 (designation of treasurer), or provisions prohibiting the sale or theft of election petitions, *see* Ohio Rev. Code §3599.15, or provisions requiring employers not to seek to influence the political views of their employees through intimidation, Ohio Rev. Code §3599.05. All of these provisions and the Disclosure Statute go to the heart of the manner in which political discourse may be conducted in election campaigns. Thus, *Anderson v. Celebrezze* frames the proper test in assessing the constitutionality of this elections law measure.

B. Ohio Rev. Code §3599.09(A) Imposes Only a Modest Burden, if Any, on First Amendment Rights.

The first issue to resolve under *Anderson* is the impact that the Disclosure Statute has on individuals who seek to exercise their First Amendment rights. On its face, the Disclosure Statute does not require anyone to espouse a position that she does not support or, for that matter, any position at all. *See Burdick*, 112 S.Ct. at 2066. It does not interfere with expression on any topic. Nor does it promote or denigrate any political thought or party.

Nothing in the record indicates that the requirements of the Disclosure Statute substantially inhibit political expression by anyone at all. It certainly did not inhibit Petitioner, who exercised her First Amendment rights to the fullest. In support of this point, the evidence shows that she campaigned vigorously against the school levy without being subjected to any regulation because of the viewpoint expressed in her message. Even in the civil enforcement action at issue here, she was penalized for her failure to make a proper attribution identifying the sponsor of her literature, not for expressing her opinion concerning the tax levy. Indeed, her views on the tax levy were never even presented to the Commission.

Further, there is no evidence in this case to support a conclusion that Petitioner had any interest whatsoever in expressing herself secretly or anonymously, which is the alleged constitutional right she seeks to vindicate before this Court. To the contrary, Petitioner made a point of personally distributing her literature at school board meetings that were heavily attended by other members of the public. She also testified at her hearing before the Commission that she had intended to include her name and address on each handbill, but had somehow failed to do so. Rather than being at all concerned with the prospect that her activities would cause her identity to be divulged, Petitioner left little doubt that she was responsible for producing and circulating the campaign material at issue in this case.

Again, it is significant that Petitioner was never penalized for expressing her views on the levy. Petitioner has speculated that the assistant superintendent's motivation for complaining to the Commission about Petitioner's violation of the Disclosure Statute was his disagreement with her position. Yet this is irrelevant to the issue here, for the constitutionality of the Disclosure Statute cannot be made to turn on the alleged motivations of the person who reports a violation of the law. The charge against Petitioner arose from her conceded failure to comply with the minimal attribution requirements of the Disclosure Statute. She was not fined for expressing her views on the school levy; she was fined for not observing a law that had no bearing on her particular message. Given these facts, she cannot claim that the attribution requirements of the Disclosure Statute imposed any substantial restrictions on the exercise of her First Amendment rights.

C. Any Burden Imposed On First Amendment Rights by Ohio Rev. Code §3599.09(A) Is Substantially Outweighed By the State's Legitimate Interests in the Deterrence of Fraud, Misleading Advertising, and Libel, and in Requiring the Disclosure to the Public of Specific Information that Is Pertinent to the Electoral Process.

The second part of the *Anderson* test requires this Court to evaluate the interests put forward by the State as justifications for the burden imposed by the Disclosure Statute. Ohio's election laws emphasize the deterrence of fraud and corruption and the disclosure of limited information that is important to assuring an educated and informed electorate. The Disclosure Statute stands as an integral part of this regulatory scheme.

The Disclosure Statute performs the important function of identifying the sponsor of printed campaign literature. If it were to be repealed or otherwise invalidated, the effectiveness of two other important provisions of Ohio elections law designed to deter fraud would be undermined. These provisions prohibit persons from making knowingly false statements during the course of candidate elections, *see* Ohio Rev. Code §3599.091(B)(2)-(10), and during the course of issue elections, *see* Ohio Rev. Code §3599.092(B).

In order to commence prosecution for a violation of either statute, a complaint in the form of an affidavit must be filed alleging violations of the provisions. *See* Ohio Rev. Code §§3599.091(C), 3599.092(C). In the absence of any requirement of attribution or disclosure, it often may be difficult, if not impossible, to identify the source of a false statement, particularly if any deliberate effort is made to avoid detection. And without accurate identification of the prevaricator, it is unlikely that anyone will have a sufficient basis to file an affidavit charging such

violations. These provisions of Ohio's election laws, therefore, will consist more of "bark" than "bite."

The Disclosure Statute also ensures that voters receive critical information enabling them to consider the source of campaign statements. *See Bellotti*, 435 U.S. at 791-92 & n.32. Invariably, voters receive a more complete picture when they know the identity of the advocate of a particular position. The disclosure requirement in Ohio Rev. Code §3599.09(A) offers the public the opportunity to evaluate campaign promises and slogans by taking into consideration the advocate's history and reputation for either trustworthiness or bias.

Equally important, the attribution requirements in Ohio Rev. Code §3599.09 ensure that the voting public can be informed about and thus can assess the disproportionate influence that may be exerted by the financial sources backing particular election campaigns. The Disclosure Statute here requires not only that the sponsor of printed campaign materials be identified, Ohio Rev. Code §3599.09(A), but similarly that the sponsor of radio and television advertisements be identified, *see* Ohio Rev. Code §3599.09(B).[3] In some issue campaigns, such as a local option election under state liquor laws, mass circulation of extensive printed materials might be the most efficient manner in which large-scale financial backing makes itself felt. In other issue campaigns, extensively-financed broadcast advertising, which has become a fairly common means of seeking to influence the electorate, may be the preferred vehicle. In either instance,

[3] Petitioner resists any attempt to link the principles at issue in this case with the regulation of "large campaign expenditures." Brief for Petitioner at 28 n.10. Yet the principles that apply to justify attribution of the sponsors of such materials are the very same. Indeed, the Disclosure Statute recognizes this link when it specifies that merely including a generic attribution, such as the "disclaimer 'paid political advertising' is not sufficient to meet the requirements" imposed under the law. Ohio Rev. Code §3599.09(A).

however, it is perfectly sensible for the State to wish to require the sponsor of any such expenditures to be identified, so that the public can evaluate the significance of who is paying for advertising time or for printed materials. Although major financial supporters of one side or another might prefer to keep their identities secret in order to avoid a possible adverse reaction from the public, there is certainly no constitutional right to avoid such public scrutiny; on the contrary, the Court has quoted with approval Justice Brandeis' observation that "Sunlight is said to be the best of disinfectants." *Buckley v. Valeo*, 424 U.S. 1, 67 (1976).

To this end, disclosure of the identities of supporters or opponents of a given ballot measure, including its financial supporters or opponents, may be more important in the context of issue elections than in candidate elections. This is because there is no opposing candidate or often no organized group to respond to or refute the allegations made during the course of an issue campaign. The identity of a supporter or opponent may therefore be the most effective barometer, if not the only barometer, available to the public for evaluating the relative worth of a proposed ballot measure. *See Brown v. Superior Court*, 487 P.2d 1224, 1232 (Cal. 1971) ("voter may reasonably seek to judge the precise effect of a measure by knowledge of those who advocate or oppose its adoption, and he may gain such knowledge only through pre-election disclosure").

It is precisely for these reasons that the Court has held there can be "no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." *Anderson*, 460 U.S. at 796. Petitioner has made no showing that her right to freedom of expression was significantly burdened by the attribution requirement contained in the Disclosure Statute, which is the means that the State of Ohio has chosen to foster those "informed and educated expressions of the popular will." *Id.*

"[W]hen a state election law provision imposes only 'reasonable, nondiscriminatory restrictions'" upon First and Fourteenth amendment rights, "'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 112 S. Ct. at 2063-64 (*quoting Anderson*, 460 U.S. at 788). The Disclosure Statute is a reasonable regulation of the electoral process because it helps to deter fraud and to ensure that the electorate has access to pertinent information. Petitioner's attack on Ohio Rev. Code §3599.09(A), therefore, must fail under the test of *Anderson v. Celebrezze*.

D. The Strict Scrutiny Urged by Petitioner Is Inconsistent with *Anderson v. Celebrezze*.

Petitioner contends that because Ohio Rev. Code §3599.09(A) affects speech, not access to the ballot, the Supreme Court of Ohio erred when it did not subject the statute to strict scrutiny. Petitioner, however, misreads this Court's jurisprudence in this area.

It is true that traditionally the Court has applied strict scrutiny to state laws that burden protected speech. Out of respect for the State's interest in election regulation, however, the Court in *Anderson* created a balancing test to weigh this important state interest against the extent of the burden placed on the exercise of First Amendment rights. As a result, strict scrutiny is appropriate only when an election regulation "severely restricts" those rights. *Burdick*, 112 S. Ct. at 2063.

One of the Court's most recent cases illustrates this point. In *Burson v. Freeman*, the Court reviewed a Tennessee statute that prohibited political campaigning within 100 feet of the polls on election day. 112 S. Ct. at 1848. This statute effectively prohibited political speech in its entirety on the most politically important day of the year at locations ideally situated to offer

speakers maximum exposure to the relevant community of listeners, those people who actually intend to vote. Because this statute represented a severe restriction on speech, the Court subjected the Tennessee statute to strict scrutiny, but upheld it despite the severity of this restriction. *See id.* at 1850-58.

Unlike the state law at issue in *Burson*, Ohio Rev. Code §3599.09(A) does not prohibit political speech at any time or place. On the contrary, it merely requires the disclosure of a limited amount of information by requiring attribution of the sponsor of printed materials, thereby increasing the amount of information available to voters. The statute in *Burson* thus restricted First Amendment rights far more severely than does the Disclosure Statute. Consequently, *Anderson*, not *Burson*, states the applicable standard of review.

Anderson dictates that the Disclosure Statute need not satisfy as stringent a test, but rather requires application of the balancing test set forth above. That test, once again, takes into account the nature of the First Amendment right affected and the degree to which that right is affected, as well as the importance of the state purposes that underlie the restriction. Viewed in this light, the important state interests promoted by Ohio Rev. Code §3599.09(A) justify the modest burden it places on First Amendment rights. A standard of review that involves strict scrutiny is not applicable here.

II. THE DECISION IN *TALLEY v. CALIFORNIA* IS INAPPLICABLE TO ELECTION MEASURES SUCH AS OHIO REV. CODE §3599.09(A)

The Supreme Court of Ohio applied the *Anderson* test to Ohio Rev. Code §3599.09(A) and determined that the statute passed constitutional muster. As part of its decision, the lower court correctly distinguished *Talley v. California*, 362 U.S. 60

(1960), which, according to Petitioner, provides the chief basis for her claim that the Disclosure Statute violates the First Amendment.

In *Talley*, a case that did *not* address an election measure, the Court struck down a "broad" municipal ordinance that barred "distribution of any [anonymous] hand-bill in any place under any circumstances" within the boundaries of the municipality. 362 U.S. at 63. Significantly, the broad prohibition that was invalidated in *Talley* was neither designed nor applied to deter fraud, misleading advertising, or libel, as the Court emphatically observed. 362 U.S. at 64. Therefore, the Court in *Talley* expressly left for another day the issue whether a more narrowly drawn statute designed to deter fraud, misleading advertising, and libel is sufficient justification for placing a more modest burden on speech. *Id.*

In this case, the Ohio Supreme Court determined that "[i]n contrast to the ordinance at issue in *Talley*, [the Commission] can legitimately claim that [Ohio Rev. Code §3599.09] has as its purpose the identification of persons who distribute materials containing false statements. Accordingly, unlike *Talley*, the disclosure requirement is clearly meant to 'identify those responsible for fraud, false advertising and libel.'" *McIntyre*, 67 Ohio St.3d at 394 (*quoting Talley*, 362 U.S. at 64). Thus, unlike the ordinance in *Talley*, Ohio Rev. Code §3599.09(A) has been given a narrowing construction that is consistent with constitutional demands.

The *Talley* Court also did not address the validity of a state statute requiring attribution of the sponsor of printed materials for the limited purpose of making critical information available to the voting public during an election campaign. As a result, the Court in *Talley* was under no necessity to balance important but competing constitutional interests.

In this case, by contrast, two constitutional interests of the highest order -- protecting the right to vote and safeguarding

freedom of speech -- are involved. It has been noted that "there is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." *Burson*, 112 S. Ct. at 1859 (Kennedy, J., concurring). That narrow area must include a law designed to "protect the integrity of" elections because "[v]oting is one of the most fundamental and cherished liberties in our democratic system of government." *Id.* Where, as here, "[t]he State is not using this justification to suppress legitimate expression," *id.*, protecting the integrity of the electoral process takes priority over any interest in secretly engaging in political activity without attribution or disclosure to the public.

III. EVEN IF A STRICT SCRUTINY ANALYSIS WERE APPLIED IN THIS CASE, OHIO REV. CODE §3599.09(A) IS CONSTITUTIONAL BECAUSE IT IS NARROWLY DRAWN TO SERVE THE COMPELLING STATE INTEREST OF COMBATTING FRAUD IN THE ELECTORAL PROCESS

The foregoing discussion explains why this Court should apply the *Anderson* balancing test, which was designed specifically to test the constitutionality of election regulations, in assessing Ohio Rev. Code §3599.09(A). Nevertheless, if this Court chooses to subject Ohio Rev. Code §3599.09(A) to strict scrutiny, the Disclosure Statute still passes constitutional muster.

When the Court reviews a state statute under the strict scrutiny standard, it must determine whether the statute serves a compelling state interest and whether the statute is narrowly drawn to serve that interest. *Burson*, 112 S. Ct. at 1851. According to the Ohio Supreme Court's definitive construction, one purpose of the Disclosure Statute is to protect the integrity and reliability of the electoral process by preventing fraud. *McIntyre*, 67 Ohio St.3d at 394. "[A] State has a compelling interest in ensuring that an

individual's right to vote is not undermined by fraud in the election process." *Burson*, 112 S. Ct. at 1852. Thus, as long as the Disclosure Statute is narrowly drawn to serve that compelling state interest, the Disclosure Statute withstands strict scrutiny.

As described in Section I.C, *supra*, Ohio Rev. Code §3599.09(A) operates in conjunction with provisions that are designed to penalize persons for making knowingly false statements with intent to influence the outcome of an election.[4] These statutory provisions legitimately prohibit speech that is constitutionally unprotected. Yet it would do little good to have laws that penalize the making of intentionally false statements if their effectiveness is undermined, or even destroyed, because the State is not permitted to employ reasonable means to identify the source of any such unprotected statements. The attribution requirement contained in the Disclosure Statute is not only the most effective way, but is the only practical way, for the State to identify those who violate the law in this manner.

Petitioner's arguments that the Disclosure Statute is not narrowly drawn to prevent fraud are flawed. It is specious to suggest that Ohio Rev. Code §3599.09(A) could be drawn to require only false and fraudulent statements to contain the attribution, *see* Brief for Petitioner at 9, as prevaricators cannot be expected to point a beacon at their own lies. Accordingly, the attribution requirement contained in the Disclosure Statute, and those contained in similar statutes, must have general application.

Petitioner also suggests that Ohio Rev. Code §3599.09(A) could be more narrowly drawn to apply only to candidate elections. Brief for Petitioner at 33. A provision drawn in that way, however, would be inadequate for at least three reasons.

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[4] For purposes of Ohio law, "knowingly false" statements include only those statements that, consistent with the standard established in *New York Times v. Sullivan*, 376 U.S. 254 (1964), fall outside the protection of the First Amendment.

First, the suggested revision presumes that the sole purpose of statutes like Ohio Rev. Code §3599.09 is to prevent libel and to protect the integrity of individuals. In making this suggestion, Petitioner appears to concede that the State is justified in requiring attribution in candidate campaigns, so that the State may hold accountable any persons who would knowingly spread lies about a candidate for office. But issue campaigns are not immune to the evils of personal slurs and the deliberate smearing of personal reputations. In a ballot issue election, individuals may be closely identified with one side or the other, and the target of a smear campaign may be a private citizen rather than a seasoned elected official. It is thus incorrect to suggest, as does one of Petitioner's authorities, that the only purpose for an attribution statement is to identify the person behind an "eleventh-hour smear campaign" against a candidate for office. *Illinois v. White*, 506 N.E.2d 1284, 1288 (Ill. 1987).

Second, the Disclosure Statute is designed to protect society and the integrity of the electoral process against fraud as well as libel. Petitioner either ignores or underestimates the harm done when a lie is responsible not for the success or failure of a candidate, but for the passage or defeat of a constitutional amendment, a referendum, a local tax levy, or any other ballot measure. In either case, society suffers because the democratic process is subverted; in either case, the State has legitimate and indeed compelling interests to protect.

Third, nothing in Petitioner's arguments would provide any principled basis for distinguishing the State's interest in protecting individuals against libel from the State's interest in preventing fraud in election campaigns. The latter interest is at least as compelling, as this Court has held. *See, e.g., Burson*, 112 S. Ct. at 1852. Petitioner understandably seeks a favorable decision here by suggesting that the permissible grounds of state regulation should stop anywhere short of the facts of this case, but there is no reason to conclude that these suggestions are at all defensible as a matter of constitutional doctrine.

Petitioner further argues that the existence of other statutes that also address the problem of fraud makes the Disclosure Statute unnecessary. Brief for Petitioner at 37-39. Ohio Rev. Code §3599.09 is not rendered unconstitutional, however, merely because other statutes may directly or indirectly address the same important problem. If that were the standard, then the existence of bribery laws would have been sufficient to render campaign disclosure statutes unconstitutional in *Buckley v. Valeo*, 424 U.S. 1 (1976). *See Burson*, 112 S. Ct. at 1855 (citing *Buckley*, 424 U.S. at 28, for the proposition that the "existence of bribery statutes does not preclude need for limits on contributions to political campaigns"). Certainly, Ohio may use more than one weapon to combat the same evil, especially when one weapon alone might prove ineffective in deterring impermissible behavior.

The Court's analysis in *Buckley* reflects this point. In that case, the Court upheld a federal law that required the disclosure of contributions and expenditures during political campaigns, noting that the compelling state interests served by disclosure were that it "deter[s] actual corruption ... by exposing large contributions and expenditures to the light of publicity" and is "essential ... to detecting violations of the contribution limitations." *Buckley*, 424 U.S. at 67-68. The campaign finance disclosure provisions did not in and of themselves prohibit political corruption or prevent anyone from making illegal contributions. Instead, they made it more difficult for corruption or illegal contributions to occur without detection.

In much the same way, Ohio Rev. Code §3599.09(A) deters fraud without actually punishing it. By requiring campaign literature to disclose the name of its sponsor, the Disclosure Statute increases the likelihood that parties will be held responsible for complying with the laws, and thus makes it more likely that the speaker or other responsible party will take care to ensure that his statements are accurate rather than simply disseminating libels or outright lies.

Without the attribution provisions of Ohio Rev. Code §3599.09, important complementary provisions of the law will be more easily evaded. As a result, Ohio's efforts to prevent fraud in the electoral process, which advance a compelling state interest, can only falter if the Disclosure Statute is invalidated. Ohio Rev. Code §3599.09(A) should therefore be upheld, even under a strict scrutiny analysis, as a constitutionally appropriate mechanism for preventing fraud in the election process.

IV. OHIO REV. CODE §3599.09(A), LIKE OTHER DISCLOSURE STATUTES, IS CONSTITUTIONAL BECAUSE ANY ASSERTED INTEREST IN SECRECY OR ANONYMITY MUST YIELD TO THE STATE'S COMPELLING INTEREST IN REQUIRING DISCLOSURE TO THE PUBLIC OF A LIMITED AMOUNT OF PERTINENT INFORMATION

A. The Court's Precedents Confirm that Disclosure Statutes Are Constitutional in Elections for Candidates and for Ballot Issues.

The Court's decisions demonstrate that disclosure statutes are constitutionally valid both in candidate elections and in ballot elections. In *Buckley*, for example, the Court confronted a challenge to the constitutionality of the Federal Election Campaign Act. This legislation "impose[d] reporting obligations on political committees and candidates" that would require disclosure of contribution lists, 424 U.S. at 62, and require "direct disclosure of what an individual or group contributes or spends." *Id.* at 75.

The *Buckley* Court identified three compelling state interests vindicated by these disclosure requirements, among them "provid[ing] the electorate with information ... as to where

political campaign money comes from and how it is spent by the candidate ... in order to aid the voters in evaluating those who seek federal office." *Id*. at 66-67 (footnote and internal quotes omitted). Recognizing the "informational interest" served by disclosure, the Court characterized the reporting requirement for individuals as a "reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our ... election system to public view." *Id*. at 81-82 (footnote omitted).

The Court was pressed to establish a blanket exemption from disclosure for minor political parties, which rarely elect candidates, and their members, who, if their identities were disclosed, might be subject to reprisal for their unorthodox views. But the Court rejected any blanket exemption, noting that

> [t]here could well be a case, similar to ... *NAACP v. Alabama* and *Bates*, where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied. But no appellant in this case has tendered record evidence of the sort proffered in *NAAC Pv. Alabama*. Instead, appellants primarily rely on "the clearly articulated fears of individuals" .... On this record, the substantial public interest in disclosure ... outweighs the harm generally alleged.

Buckley, 424 U.S. at 71-72 (footnotes and citations omitted); *see also id*. at 69-70 (distinguishing *NAACP v. Alabama*, 357 U.S. 214 (1966), where the organization had made an uncontroverted showing that on past occasions revelation of the identity of its members had exposed them to economic reprisal, threats of physical coercion, and other manifestations of public hostility).

Both the statutory provisions upheld in *Buckley* and Ohio Rev. Code §3599.09(A) require disclosure during election

campaigns of information that implicates the First Amendment. Both laws have as a major goal the assurance that the public has access to pertinent information about the sponsorship of political campaigns. Thus, although *Buckley* addressed the constitutionality of campaign finance disclosure laws, it provides a workable and appropriate framework for evaluating whether the Disclosure Statute is constitutional.

The general rule to be gleaned from *Buckley* is that the voting public has a compelling interest in having certain information made available to help it decide the important issues of the day and, accordingly, the States and the Federal government are authorized to require disclosure of such limited information in a way that does not significantly encroach on First Amendment rights. The Court's treatment in *Buckley* of its earlier decision in *Talley* underscores the point that the *Buckley* approach is properly applicable to election disclosure laws such as Ohio Rev. Code §3599.09(A).

In the course of rejecting the contention that *Talley* barred the application of campaign finance disclosure laws to individuals, the Court stated in *Buckley*:

> The ordinance found wanting in *Talley* forbade all distribution of handbills that did not contain the name of the printer, author, or manufacturer, and the name of the distributor. [Respondent] urged that the ordinance was aimed at identifying those responsible for fraud, false advertising, and libel, but the Court found that it was "in no manner so limited." 362 U.S., at 64. Here, as we have seen, the disclosure requirement is narrowly limited to those situations where the information sought has a substantial connection with the governmental interests sought to be advanced.

Buckley, 424 U.S. at 82 (*quoting Talley*, 362 U.S. at 64). The Court in *Buckley* did not distinguish *Talley* on the ground that *Talley* involved the distribution of handbills or literature or on the ground that it involved the asserted state interests of preventing fraud, misleading advertising, and libel. Instead, the Court found *Talley* inapposite because in that case there was no "substantial connection" between "the information sought" and the "governmental interests ... to be advanced." *Buckley*, 424 U.S. at 81.

In the case at bar there plainly is a "substantial connection" between the need for disclosure and the State's interest in assuring that a limited amount of pertinent information about the sponsorship of political advertisements is made available to inform the voting public. As this Court recently observed, "the identity of the speaker is an important component of many attempts to persuade." *City of Ladue v. Gilleo*, 62 U.S.L.W. 4477, 4481 (U.S. June 13, 1994). Ohio Rev. Code §3599.09(A) does nothing more than assure that such limited information is disclosed in order to permit a more informed electorate to make rational decisions about the candidates and issues of the day.

Although *Buckley* specifically addressed the justifications for disclosure in candidate elections, the value of an informed voting public is equally compelling in the context of issue elections, for the results of either kind of election can have serious ramifications for the citizenry for years to come. For example, an uninformed or misinformed vote cast in a candidate election may result in the election of a less deserving candidate, which might indirectly affect the shaping of public policy on particular issues. But an uninformed or misinformed vote cast against a school board levy, as in this case, can also shape public policy by affecting not only the quality of children's education but also the level of taxation of real property.

Thus, disclosure is as necessary in issue elections as in candidate elections. Although there is no candidate for office who

can be corrupted, the process for determining ballot issues can be severely skewed in the direction of one side or the other, perhaps through particular groups exerting their influence by sponsoring mass distribution of printed materials or an extensively-financed media campaign. Further, the subject matter of the ballot issue may be complex and not lend itself to easy analysis. The supporters or opponents of a ballot issue, because they have a special interest in and knowledge of the subject, may be able and willing to devote great amounts of time or money to promoting the position they favor. The public may have little or no idea who or what is the driving force for or against the passage of a particular ballot issue. Thus, the disclosure of the identity of those whose distribution of printed materials or sponsorship of media advertising makes them principal supporters or opponents may send a clarion call to the public that closer attention is warranted.

The concept that disclosure of the supporters of a ballot issue is constitutionally permissible has been approved by the Court. In *Bellotti*, the Court examined a state statute that prohibited corporations from making contributions or expenditures "for the purpose of ... influencing or affecting" the outcome of a ballot issue. 435 U.S. at 768 (*quoting* Mass. Gen. Laws Ann., Ch. 55, §8 (West Supp. 1977)). In one part of its holding, the Court invalidated this prohibition, finding that neither the "First or Fourteenth Amendment, or the decisions of this Court, [support] the proposition that speech that otherwise would be [protected by] ... the First Amendment loses that protection simply because its source is a corporation." 435 U.S. at 784.

Although the Court held that a State could not prohibit corporate contributions and expenditures, the Court recognized that the people should be permitted, in connection with an issue election, to "consider, in making their judgment, the source and credibility of the advocate." *Bellotti*, 435 U.S. at 791-92. To that end, the Court specifically observed that attribution statements identifying the source of advertising may be required by statutory disclosure provisions:

> Identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected. *See Buckley*, 424 U.S. at 66-67.... In addition, we emphasized in *Buckley* the prophylactic effect of requiring that the source of communication be disclosed. 424 U.S. at 67.

Bellotti, 435 U.S. at 791 n.32. Although *Bellotti* specifically involved the First Amendment rights of corporations, nothing in the Court's footnote 32 limits its scope to the disclosure of the identities of *corporate* sponsors of campaign literature. To the contrary, the Court's reliance on *Buckley*, in which the Court expressly permitted the disclosure of the identities of individuals, suggests that disclosure of the "source of the advertisement" serves an important state interest regardless of whether that source is a corporation, an association, a partnership, a civic group, or an individual.[5]

Moreover, the application of such attribution requirements to individuals or individual groups in ballot issue elections makes sense. Although corporations have great financial resources, community activists and community organizations may exert significant influence over the outcome of ballot issue elections, including such purely local issues as liquor option elections or tax levies on real property. The association of such persons or groups with one side or the other of a ballot issue, or their financial sponsorship of one side or the other, is important information to the electorate, just as personal or group endorsements of candidates

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[5] Petitioner's attempt to distinguish *Bellotti* by contending that it involved advertising by corporations, Brief for Petitioner at 32-33, is thus misplaced. Nothing in the principles at issue here would support such a distinction, and the combination of *Bellotti* and *Buckley* shows it to be unfounded. Thus, Petitioner is ultimately forced to disparage this passage from the Court's footnote 32 in *Bellotti* as "tentative." *Id.*

provides important information to voters when they are choosing elected officials.

It may be conceivable that someone, under certain peculiar circumstances, could decide to remain silent rather than speak because disclosure statutes such as this one do not permit him to cloak his speech with the secrecy of anonymity. Indeed, in *Buckley*, the Court expressly observed that "[i]t is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who might otherwise contribute." 424 U.S. at 68. Nonetheless, the *Buckley* Court went on to conclude that the strong public interest in disclosure outweighed any potential harm to unidentified individuals. There is no good reason here to depart from that conclusion.

In this case, Petitioner's identity and her association with the opposition to the school levy could well have been important information for the public. Her history as an opponent to school levies appears to have been well known in her community, and the public was entitled to know the source of the literature they reviewed in evaluating it for possible bias.

B. Disclosure Statutes in Other Areas of the Law Have Been Upheld Even When They Impose Burdens on First Amendment Activities.

The validity of disclosure statutes has also been upheld by the Court in other areas outside the field of elections law. In such decisions, the Court has applied the same principle that the States and the Federal government may reasonably require the disclosure of limited amounts of information, particularly where the information discloses the sources of statements and of any financial sponsorship that lies behind them, even though the required disclosures may impose some incidental burdens on First Amendment activities.

In *United States v. Harriss*, 347 U.S. 612 (1954), for example, the Court upheld the constitutionality of disclosure requirements for lobbyists. In arriving at this holding, the Court began by noting that a mere disclosure requirement imposes only a modest burden on First Amendment rights, seeking not to prohibit any speech but rather simply to require "a modicum of information" from those who engage in lobbying to influence legislation. *Id.* at 625. This modest burden was readily justified by the legitimate state interest in "maintain[ing] the integrity of a basic governmental process." *Id.* In discussing this interest, the Court recognized that disclosure requirements serve the purposes of deterring fraud and assuring that pertinent information is made available to political actors who can make use of it. Without such disclosure laws, "the voice of the people may all too easily be drowned out by the voice of the special interest groups seeking favored treatment while masquerading as proponents of the public weal." *Id.* The same concerns, once again, may very well arise in the course of an election campaign over a proposed ballot measure.

As in *Buckley*, moreover, the Court acknowledged in *Harriss* that reporting requirements "may as a practical matter act as a deterrent to [a lobbyist's] exercise of First Amendment rights," in particular the right of free speech and the right to petition the government for the redress of grievances. 347 U.S. at 626. It nonetheless concluded, again as in *Buckley*, that the prospect of "such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest." *Id. See also Bellotti*, 435 U.S. at 792 n.32 (citing both *Buckley* and *Harriss* as support for the conclusion that "[i]dentification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected").

The Court has reached the same conclusion in assessing disclosure requirements in the area of charitable solicitations. In

Riley v. National Federation of the Blind of North Carolina, Inc., 487 U.S. 781 (1988), the Court invalidated numerous provisions of North Carolina's charitable solicitations laws, but took care to caution that "nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status." *Id.* at 799 n.11. The lower courts have followed this admonition and, though invalidating some of the more extensive disclosure requirements, have consistently upheld state laws that require a charitable solicitor to disclose her name and the name of any entity for which she is acting as an agent. *See, e.g., American Ass'n of State Troopers, Inc. v. Preate*, 825 F. Supp. 1228, 1233 (M.D. Pa. 1993); *Indiana Firemen's Ass'n, Inc. v. Pearson*, 700 F. Supp. 421, 425 (S.D. Ind. 1988).[6]

Ohio Rev. Code §3599.09(A) is likewise a disclosure statute, but in the context of the right to vote, and therefore the same justifications relied on to uphold other kinds of disclosure provisions apply with even greater force here. The possibility that someone could be discouraged from speaking by nothing more than a modest disclosure requirement should not take precedence over the substantial, indeed compelling, state interests the Court has recognized are furthered by the enforcement of such provisions. In circumstances where the disclosure of a limited amount of pertinent information to the public is demonstrably justified, disclosure provisions like Ohio Rev. Code §3599.09(A) are constitutionally valid.

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[6] In corporate proxy campaigns, Congress has also required extensive disclosures "to promote the free exercise of the voting rights of stockholders by ensuring that proxies would be solicited with explanation to the stockholder of the real nature of the questions for which authority to cast his vote is sought." *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 381 (1970) (construing 15 U.S.C. §78n(a)) (internal quotes omitted).

C. American Historical Tradition Does Not Support Petitioner's Contention that There Is an Absolute Right to Engage in Anonymous or Secret Political Activity.

Any right to engage in political activity in secret or without attribution, if any such right exists at all, surely is not absolute. The Court's decision in *Buckley*, still the landmark decision concerning campaign finance disclosure, makes it clear that the States and the Federal government, in order to enhance the electoral process, may require individuals and groups to disclose certain types of limited information. And *Buckley* stands for the proposition that this is so even when individuals and groups are engaging in political activities and political speech located at the very core of First Amendment freedoms.

Petitioner appears to suggest that because some of the Framers published anonymous writings during the Revolutionary period, and other public figures have done so since, the First Amendment must be understood to prohibit *any* government restrictions on those who wish to engage in political activity in secrecy or without attribution. Brief for Petitioner at 12-15. The publication of anonymous and pseudonymous books and essays has indeed played an important role in American history. Yet this general observation is insufficient to control the specific disclosure issues raised in this case. Moreover, by citing a few historical examples to buttress her argument, Petitioner ignores two critical points that place such publications in their appropriate historical context.

First, even in the American colonial era, the practice of anonymous publication was controversial because many believed that it did not give readers sufficient information to evaluate the context of such publications. Although the use of pseudonyms was commonplace during the debate that preceded ratification of the Constitution, it became a "hotly contested" issue, as "Federalist

and Anti-Federalist editors debated the continuing necessity of this practice and its practical impact on the character of public debate over ratification." Saul Cornell, *The Other Founders: Anti-Federalism and the American Constitutional Tradition* (forthcoming 1995) (manuscript at 169, on file with author and The Institutute of Early American History and Culture, Williamsburg, Virginia). In fact, "[w]hile the most famous series of Federalists essays were published under the pseudonym of Publius, many Federalists began to rethink the continuing desirability of the policy of anonymous publication." *Id.* at 171.

The chief concern raised by anonymous or secret publication was whether the author would be able to conceal his true motives when attempting to influence public opinion:

> We cannot but have domestic and foreign enemies, who would most cordially rejoice at our misfortunes: Indeed it would be for the interest of the other nations, to keep us in our divided and distracted condition. The emissaries of these, by anonymous productions, will probably fill the press with objections against the report of the Convention. But as every American has a right to his own sentiments on the subject, so he must have liberty to publish them. The press ought to be free. Yet he cannot be a friend to his country, who upon a production on the subject, will conceal his name. Therefore, it is submitted to you, gentlemen, and the other Printers in the State, whether it will be best to publish any production, where the author chooses to remain concealed.

Editors, Boston Independent Chronicle, Oct. 4, 1787 (*reprinted in* XIII *The Documentary History of the Ratification of the Constitution* 315 (John P. Kaminski and Gaspare J. Saladino eds., 1981).

Less than a week later, newspapers began to heed this advice. For example, the Massachusetts Centinel required that all writers must be "willing his name should be handed to the publick" in case his writings "have an influence to deceive some, who supposing them to be the result of an honest enquiry of some friend to our country, may give them attention." Editors, Massachusetts Centinel, October 10, 1787 (*reprinted in* XIII *The Documentary History, supra*, at 315-16).

Thus, contrary to Petitioner's suggestion that secrecy or anonymity reflects a sacred and untouchable American tradition, the practice of anonymous-publication without attribution was controversial even for those, like the Federalists, who used it to their advantage. And it was controversial for the very reason that the State here relies on to justify the modest disclosure requirements contained in Ohio Rev. Code §3599.09(A): disclosure of the identity of the writer helps the public to appraise the source and evaluate the value and sincerity of the message. A more narrow application of this general principle -- that the sponsorship of printed material and broadcast advertising should be disclosed to the public to permit more informed decisionmaking -- underlies the enactment of federal and state laws such as the Disclosure Statute.

Second, with the ratification of the Constitution and the subsequent passage and application of the Bill of Rights, many of the most serious concerns that led the colonial patriots to act in secrecy were eventually dissipated or eliminated. Perhaps the most important of those concerns was the threat of punishment for seditious libel, which could fall upon any individual who engaged in speech critical of the government. Colonial printers were well aware of the reality of criminal and other legal restraints on their expression. Norman L. Rosenberg, *Protecting the Best Men: An Interpretive History of the Law of Libel* 44 (1986). Once American patriots began to actively resist British policies, they recognized their own personal stake in expressing anti-British opinions:

> Anonymously arguing ... in the *New-York Gazette*, William Smith underscored the obvious: if British officials could actually enforce Orthodox Whig theories of seditious libel, then "all our Vindications since the Year 1765 are seditious and libelous, if not of a Treasonable Complexion. What if a Door should be opened, to be revenged of the Patriots who have wrote and printed in our Favour?"

Id. at 51 (*quoting* the New York Gazette, Mar. 19, 1770).

The danger of seditious libel suits did not end at once with victory in the Revolutionary War. Even after the founding of this new nation, many people, especially the Anti-Federalists, feared the inauguration of national libel prosecutions. *Id.* at 69. These fears led directly to the adoption of the First Amendment. *Id.* at 70. Ratification of the First Amendment, however, did not immediately stem the tide of seditious libel suits. In fact, these suits increased: "Development of national political factions and partisan newspapers during the 1790s provided the background for fierce debates over the proper limits on political speech and for more frequent use of political libel prosecutions." *Id.* at 71. The increased use of political libel suits reflected "a growing desire among some people, especially those of 'the Federalist persuasion,' to substitute libel laws for rhetorical denunciations of licentious publications." *Id.* at 75-76. Fear of widespread political criticism drove the Federalists to pass the Sedition Act of 1798. *Id.* at 259. Only in the aftermath of this discredited measure did the threat posed by such laws finally recede.

The threat of seditious libel suits no longer exists under the Court's jurisprudence interpreting and applying the First Amendment. As the Court observed in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), "[a]lthough the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history." *Id.* at 276 (footnote omitted). Both the President and the Congress eventually recognized the

unconstitutionality of such laws, and the "invalidity of the Act has also been assumed by Justices of this Court .... These views reflect a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment." *Id*. Thus, the principal concern that led many early Americans to publish political tracts critical of the government in secret is not present today.

In this case, for example, by enactment of the Disclosure Statute, the Ohio General Assembly is not threatening to resurrect actions to punish seditious libel or to regulate political expression in general. The measure does not purport to bar all anonymous speech, whether engaged in for political purposes or otherwise, nor could it legitimately do so. Instead, it simply requires the disclosure of a limited amount of information to the public, in order to advance what the Court has recognized as compelling interests in the area of election regulation. For these reasons, the Disclosure Statute does not run afoul of any unconditional or absolute interest in engaging in political activity in secret or without attribution.

Petitioner's sweeping argument -- that anonymous speech, undertaken in secrecy and without public attribution, transcends any constitutional regulation whatsoever by the State -- is unsupported either by the decisions of the Court described previously, *see* Sections IV.A & IV.B, *supra*, or by the actual history of this country under the provisions of our Constitution. This case is not about the general issue of whether books and essays can be published under a pseudonym. Instead, the specific issue in this case is whether a narrowly focused disclosure requirement enacted as part of a comprehensive state "election code[]," *see Anderson*, 460 U.S. at 788, is justified by the State's acknowledged interests in preventing fraud and assuring that the public will have access to a limited amount of pertinent information. In this context, Ohio Rev. Code §3599.09(A) is constitutional.

D. Taken Together, the Decisions in *Burson v. Freeman*, *First National Bank of Boston v. Bellotti*, and *Buckley v. Valeo* Demonstrate that Ohio Rev. Code §3599.09(A) Is a Constitutional Disclosure Statute.

Ultimately, this Court need look no further than *Burson*, *Bellotti*, and *Buckley* to resolve this controversy. All three cases reflect the appropriate deference the Court extends to election regulations in order to preserve the States' authority to safeguard the integrity of the electoral process.

Once again, the Tennessee statute challenged in *Burson* was a content-based restriction on political speech. In its actual application, the law prohibited any political dialogue between advocates and voters on election day within 100 feet of the polls, which is undoubtedly the most compelling meeting place for those engaged in participatory democracy. The Court "has recognized that 'the First Amendment has its fullest and most urgent application to'" this type of speech. *Burson*, 112 S. Ct. at 1850 (*quoting Eu v. San Francisco Democratic Committee*, 489 U.S. 214, 223 (1989)) (internal quotes omitted). Nevertheless, the Court upheld that measure, concluding that the State's compelling interest in preventing fraud suffices to justify even a blanket ban on political speech.

In comparison, any burden on speech resulting from the application of the Disclosure Statute is modest. Unlike the law challenged in *Burson*, political speech is not prohibited under Ohio Rev. Code §3599.09(A). The statute only requires disclosure of a limited amount of pertinent information to the public to help prevent fraud and preserve the integrity of the electoral process. Moreover, there is no suggestion that the prescriptions of the Disclosure Statute favor one political message over another.

Bellotti stands for the proposition that disclosure of the identity of a sponsor of campaign literature distributed during an issue campaign is constitutional. The influence that an individual or corporation may have on the outcome of an issue election is not necessarily gauged by the amount of money spent. Influence in an election can be measured in different ways, especially in campaigns involving purely local issues, such as liquor option elections and local property tax issues. The identity of an active sponsor of mass-produced printed materials or media advertising can have just as much influence on the results of a local election as the identity of a corporate speaker. There is no justification for suggesting that they must be treated differently as a matter of constitutional law.

Finally, the Court's decision in *Buckley* resolves several issues raised by Petitioner. *Buckley* upheld the constitutionality of campaign finance reporting laws even when they required disclosure of the identities of members of minor parties or unpopular organizations. In this case, the Court must determine whether the Disclosure Statute encroaches upon First Amendment rights to a greater degree than campaign finance disclosure laws.

The gist of Petitioner's argument is that even the most active proponents and opponents of a ballot issue -- persons who are interested enough in influencing the outcome of an election to sponsor mass-produced campaign literature -- are entitled to do so secretly or anonymously. Yet *Buckley* squarely held that members of unpopular organizations and minor political parties, who may do nothing more than pay dues or make small donations in support of a candidate, are not entitled to do so secretly or anonymously. No one can seriously argue that opposition to a local tax levy exposes an individual to greater peril or ostracism than does membership in an unpopular organization or minor political party. Indeed, the latter presents far greater peril of persecution if an individual's identity is exposed, for unpopular organizations or minor political parties can be perceived as threats to accepted

community standards or beliefs, whereas opposition to a local tax levy often is predicated exclusively on economic concerns.

Nonetheless, the only exception to campaign finance disclosure laws that the *Buckley* Court carved out under the First Amendment was for members of organizations who could demonstrate that the disclosure of their identities likely would result in specific injuries. Even if such an exception to the Disclosure Statute were appropriate here, however, Petitioner has failed, based on the record, to demonstrate any concrete injury that resulted from disclosure of her identity during the school levy campaign. Her only allegations in this regard, *see* Brief for Petitioner at 19, are unsubstantiated, and any such vague perception of potential harm is a far cry from the degree of injury demanded by the Court in *Buckley*.[7] Moreover, Petitioner could not realistically fear that placing her name on the flyers, thereby associating herself with opposition to the proposed school levy, would lead to retaliation, for she already was well known as an outspoken critic of the levy. Indeed, in addition to placing her name on many copies of the flyer at issue, she testified that she had intended to place her name on all of them. J.A. 36-39.

Because Petitioner could not show that she was uniquely harmed by the disclosure of her identity, her alleged interest in engaging in political activity secretly or anonymously must yield to the requirements of the Disclosure Statute, which provide a "reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our ...

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[7] *Brown v. Socialist Workers' Party*, 459 U.S. 87 (1982), is a good example of the circumstances in which the Court has deviated from the general proposition that blanket exceptions to campaign disclosure laws are unwarranted. In *Brown*, the respondents provided the type of concrete evidence of injury -- FBI surveillance of party members, destruction of property, and police harassment -- that the *Buckley* Court considered necessary to avoid disclosure. *Id.* at 99.

election system to public view." *Buckley*, 424 U.S. at 82 (footnote omitted).

E. Ohio Rev. Code §3599.09(A) Is Narrowly Tailored to Serve the Compelling State Interest of Disclosure.

Not only does the Disclosure Statute further a compelling state interest without significantly affecting First Amendment rights, but it is as narrowly drawn as possible. The purpose of the law is to assure that a limited amount of pertinent information is made available to the electorate. As one noted commentator has written: "The interest in providing voters with information that will permit them better to assess campaign literature ... is not so readily protected by ... means [other than disclosure]." Laurence H. Tribe, *American Constitutional Law* 1132 (2nd ed. 1988). That is because no middle ground exists between secrecy or anonymity, on the one hand, and disclosure of the sponsor's identity, on the other.

Indeed, the Disclosure Statute is more narrowly drawn to promote a compelling state interest than are campaign finance disclosure laws. Under campaign finance disclosure laws, all contributors are required to divulge their identities. This means small and large contributors are treated the same, regardless of the extent to which their contributions may influence an election. By contrast, the Disclosure Statute seeks to identify only a small fraction of the community that supports or opposes a given ballot issue. Unlike the identity of the inactive member or occasional contributor to a minor political party, whose identity must be divulged under campaign finance disclosure laws, the anonymity of the occasional campaign volunteer is unaffected by the Disclosure Statute. Consequently, under Ohio Rev. Code §3599.09(A), only some of the most active participants in the electoral process -- those persons or organizations who sponsor

mass-produced printed materials or media advertising -- must divulge their identities.[8]

Petitioner complains that the Disclosure Statute is not narrowly tailored because it does not establish a minimum amount necessary to trigger application of the disclosure requirement and exempts certain campaign materials because of their size. Brief for Petitioner at 36-37. As to the former, the Court in *Buckley* determined that campaign finance disclosure laws were not constitutionally suspect even though they established $10 as the minimum threshold. Practically speaking, there is no substantial difference between a $10 minimum and no minimum. Further, disclosure of the identity of those responsible for campaign literature has a purpose independent of contributions and expenditures: the voting public benefits from knowing the identity of sponsors of mass-produced printed materials or media advertising regardless of whether they have expended significant sums of money to promote their position.

Turning to the exemption for certain campaign materials, Petitioner is correct that the Disclosure Statute exempts from its coverage "printed communications such as campaign buttons, balloons, pencils, or like items, the size or nature of which makes it unreasonable to add an identification or disclaimer." Ohio Rev. Code §3599.09(A). This exemption, which mirrors federal law, *see* 11 C.F.R. §110.11 (excepting from federal disclosure

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[8] To ensure that the extent of such disclosure is kept to a minimum, mass-produced campaign literature sponsored by an organization must contain only the name of its chairman, treasurer, or secretary. Ohio Rev. Code §3599.09(A). In addition, the Disclosure Statute "does not apply to the transmittal of personal correspondence that is not reproduced by machine for general distribution." *Id.*

requirements materials such as "bumper stickers, pins, buttons, pens and similar small items upon which the disclaimer cannot be conveniently printed"), reflects a reasonable decision not to promote form over substance. Requiring disclosures to appear on small novelty items would serve no tangible purpose because printing on such items can be difficult and any disclaimer would itself either be so small as to be illegible or so large as to obscure any other message printed on such items. Rather than posing any serious constitutional problems, this exemption simply comports with common sense.

The consistent theme of the Court's election law jurisprudence is that "[p]reserving the integrity of the electoral process ... [is an] interest[] of the highest importance." *Bellotti*, 435 U.S. at 788-89. That integrity depends on "an informed public opinion." *Barr v. Matteo*, 360 U.S. 564, 577 (1959) (Black, J., concurring). The Disclosure Statute preserves the integrity of the electoral process and contributes to informed public opinion by assuring that the electorate has access to limited attribution information that is critical in evaluating campaign literature, especially by identifying any special interests who may be financing it. Petitioner's First Amendment challenge to the validity of Ohio Rev. Code §3599.09(A) must therefore be rejected.

CONCLUSION

For the preceding reasons, the judgment of the Supreme Court of Ohio should be affirmed in this case.

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No. 93-986

In The

Supreme Court of the United States

October Term, 1994

JOSEPH McINTYRE, EXECUTOR OF THE ESTATE OF MARGARET McINTYRE,

Petitioner,

v.

OHIO ELECTIONS COMMISSION,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Ohio

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REPLY BRIEF OF PETITIONER

ARGUMENT

The Ohio Elections Commission rests its defense against the constitutional challenge to § 3599.09 on two faulty contentions. First, the Commission contends that the § 3599.09 flat ban on petitioner McIntyre's anonymous political campaign leaflets distributed in public places should not be subjected to the strict scrutiny this Court routinely applies to restrictions on core political speech. Second, the Commission contends that the need to prevent election fraud and to inform Ohio's electorate justifies special restrictions on election-related leafletting by private citizens on public forums. Neither contention is correct and neither justifies the

Ohio Supreme Court's decision that § 3599.09 is constitutional on its face and as applied.

I. THE CLAIM OF THE OHIO ELECTIONS COMMISSION THAT THE § 3599.09 RESTRICTION ON CORE POLITICAL SPEECH IS NOT SUBJECT TO STRICT SCRUTINY IS ERRONEOUS.

In attempting to defend the § 3599.09 prohibition against anonymous political campaign leaflets "designed to . . . influence voters in any election," the Commission argues that this Court should uphold § 3599.09 because it is part of a comprehensive framework of election regulation. (Resp. Br. 7-9). Using the approach employed by the Ohio Supreme Court, the Commission reasons that the presence of § 3599.09 in the Ohio Election Code somehow renders the statute immune from strict judicial scrutiny applicable to government restrictions on the content of core political speech.

The source of the Commission's claim that strict scrutiny is inapplicable lies in its refusal to recognize that traditional political leafletting in public places is entitled to the greatest protection that the First Amendment provides. *Lovell v. Griffin*, 303 U.S. 444 (1938); *Schneider v. State*, 308 U.S. 147 (1939); *Martin v. Struthers*, 319 U.S. 141 (1943). According to *Burson v. Freeman*, 112 S. Ct. 1846 (1992), statutes that govern leafletting and similar activities near polling places are to be measured by the highest level of judicial scrutiny. According to *Burson*, to sustain § 3599.09 "[t]he State must show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" 112 S.Ct. at 1851 (citations omitted).

In its effort to avoid application of strict scrutiny to § 3599.09, the Commission cites both *Buckley v. Valeo*, 424 U.S. 1 (1976) and *First National Bank of Boston v. Bellotti*,

435 U.S. 765 (1978). It contends that the § 3599.09 ban on anonymous political leaflets is the equivalent of the campaign financing legislation at issue in both *Buckley* and *Bellotti*. Unfortunately for the Commission's argument, the campaign financing laws in both of those cases were subjected to strict scrutiny. For example, strict scrutiny was applied in *Buckley* when this Court reviewed the constitutionality of § 434(e) of the Federal Election Campaign Act, which requires disclosure of independent campaign expenditures in excess of $100. The *Buckley* Court stated: "In considering this provision we must apply the same strict standard of scrutiny, for the right of associational privacy developed in *NAACP v. Alabama* [357 U.S. 449 (1958)], derives from the rights of the organization's members to advocate their personal points of view in the most effective way." 424 U.S. at 75 (citations omitted). Similarly, in *Bellotti* this Court stated, "The constitutionality of § 8's prohibition of the 'exposition of ideas' by corporations turns on whether it can survive the exacting scrutiny necessitated by a state-imposed restriction of freedom of speech." 435 U.S. at 786.

The Commission's effort to avoid the precedential force of the use of strict scrutiny in *Talley v. California*, 362 U.S. 60, 65-66 (1960), is equally faulty. Instead of looking to *Talley*, the Commission contends that this Court should rely on *Anderson v. Celebrezze*, 460 U.S. 780 (1983). The Commission contends that the constitutionality of restrictions on the content of election-related streetcorner leaflets should be measured by the *Anderson* standard of review that is applicable to complex election codes which govern, among other things, a candidate's access to the election ballot. It should be noted that the standard of review employed in *Anderson* was strict enough to overturn a restrictive early filing deadline imposed by the Ohio election code.

Moreover, the Commission argues that this Court's selection of a standard of review should turn on the content of the leaflets at issue. If, as in *Talley*, the leaflets oppose race

discrimination, then the Commission apparently agrees that review should be by strict scrutiny. However, if the leaflets oppose passage of an increase in property taxes on a referendum ballot, then the Commission believes that a more relaxed standard of review should be applied. This argument overlooks the fact that political leaflets receive special constitutional protection because they are a time-honored means of political advocacy, and they are "an unusually cheap and convenient form of communication."[1]

II. THE CLAIMS OF THE OHIO ELECTIONS COMMISSION THAT § 3599.09 IS JUSTIFIED BY INTERESTS IN FRAUD PREVENTION AND IN A PROPERLY INFORMED ELECTORATE DO NOT SAVE IT FROM BEING UNCONSTITUTIONAL.

A. Neither the interest in fraud prevention nor in libel prevention justifies a flat ban on anonymous campaign leafletting.

The Commission claims that § 3599.09 is saved from unconstitutionality because the Ohio Supreme Court held that the statute was enacted to enable "identifying those responsible for fraud, false advertising and libel." (Pet. App. A.5). It asserts that this statement of legislative purpose is the equivalent of "a narrowing construction that is consistent with

[1]*City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2046 (1994). Moreover, the Court's recent decision in *Turner Broadcasting System, Inc. v. F.C.C.*, 114 S. Ct. 2445 (1994) compels the choice of strict scrutiny in this case. While *Turner* permitted the use of the intermediate standard of review applicable to content-neutral regulations, the Court reaffirmed strict scrutiny as the standard for review of government control over the content of messages expressed by private individuals. 114 S. Ct. at 2458-59.

constitutional demands." (Resp. Br. 16). This claim is wrong for several reasons.

First, judicial language that merely states the purpose of a statute does not supply a narrowing construction. Whatever the legislative purpose of § 3599.09, the statute's language is not confined to fraudulent or libelous communication. On the contrary, § 3599.09 requires that everyone responsible for the distribution of so much as a single leaflet must put his or her name and address on that leaflet -- whether or not the leaflet contains any "fraud, false advertising and libel." Indeed, the statute was enforced against the petitioner for distributing a leaflet that contained neither fraud nor libel. Moreover, the Ohio Supreme Court rejected the ruling by the Franklin County Court of Common Pleas that § 3599.09 had been unconstitutional as applied to Mrs. McIntyre. Therefore, it is erroneous for the Commission to claim that the statute, which flatly bans all distribution of anonymous leaflets containing election-related statements, has been narrowly construed by the Ohio courts.

Second, neither the Commission nor the Ohio Supreme Court explained what type of non-financial fraud would be prevented by § 3599.09 in referendum elections. Instead, both rely on the generalized claim that a flat ban on anonymous leafletting is necessary to deter or to prevent the possibility of fraud. The Commission attempts to amplify this proposition by asserting that the § 3599.09 compulsory disclosure requirement facilitates identification of those who might be violating other anti-fraud prohibitions in the Ohio Election Code. (Resp. Br. 11-12). The constitutional defect in this assertion lies in the fact that the flat ban on anonymous leafletting in § 3599.09 serves as a prophylactic tool which, in effect, presumes that all anonymous leafletting is inherently fraudulent and is therefore legitimately prohibited. This is forbidden by the First Amendment because the state "cannot

impose a prophylactic rule requiring disclosure" where the rule covers constitutionally protected political speech that is a normal part of political debate. *Riley v. National Federation of the Blind*, 487 U.S. 781, 803 (1988), (Scalia, J., concurring in part and concurring in judgment). Moreover, the implicit presumption that all anonymous leafletting is fraudulent is inconsistent with this Court's teaching in *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636-637 (1980), that laws designed to prevent fraud, but which also restrict speech, must be narrowly drawn.[2]

The Commission claims that the § 3599.09 ban on anonymous campaign leaflets about ballot issues is needed to protect private persons who might be libeled in such leaflets. (Resp. Br. 19). Its fear of the possibility of libelous statements in referendum election leaflets is insufficient to justify § 3599.09 for two reasons. First, the libel of a private person during a campaign for votes in a referendum election is distinct from the issue to be voted on. The appropriate remedy is a private one -- usually a civil tort action -- not a broad-gauge statute banning anonymous, non-libelous leaflets. Second, use of 3599.09 as a protection against private libels during referendum campaigns is an extension of Ohio's election law in order to facilitate redress of private grievances. The net impact of such an extension is to discourage non-

[2]In *Talley*, Justice Harlan's concurrence explicitly rejects the Commission's argument that a prophylactic ban is needed to enable Ohio to identify possible wrongdoers: ". . . I think it will not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character. In the absence of a more substantial showing as to Los Angeles' actual experience with the distribution of obnoxious handbills, such a generality is for me too remote to furnish a constitutionally acceptable justification for the deterrent effect on free speech which this all-embracing ordinance is likely to have." 362 U.S. at 66-67 (Harlan, J., concurring) (footnote omitted).

libelous leafletting and to deny public issue debate the "breathing space" that it relies on for its vitality. *New York Times v. Sullivan*, 376 U.S. 254, 271-272 (1964).

Moreover, even by the Commission's own measure, the narrowing construction contended for has not occurred. As conceded in the Commission's brief, § 3599.09 bans all anonymous leaflets designed to "influence the voters in any election." (Resp. Br. 8). The Commission relies on this language to explain the nature of the state interest that § 3599.09 is said to protect. However, in relying on the "influence the voters in any election" language, the Commission actually magnifies the open-ended character of the statute. Under its interpretation, any anonymous leaflet critical of an incumbent might violate the statute, even if, as in the case of a U.S. senator, the election might be five years hence. Also, pamphleteers would need to speculate at their own risk as to what publications would be designed to "influence the voters." A similar phrase was addressed in *Buckley v. Valeo*, 424 U.S. at 76-79. It was approved there only after this Court concluded it was limited to contributions or expenditures made to influence voters in candidate election campaigns. No such limiting construction of the similar language of § 3599.09 is available because § 3599.09 explicitly covers referenda as well as candidate elections. Indeed, if § 3599.09 could be narrowed to candidate elections, petitioner's referendum-related leafletting under the innocent circumstances of this case would not be the basis of penalties.

The absence of a genuine limiting construction of § 3599.09 is fatal. "In these circumstances, particularly where as here appellee offers several distinct justifications for the [statute] in its broadest terms, there is no reason to assume

that the [statute] can or will be decisively narrowed." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217 (1975).[3]

Insofar as elections are concerned, Ohio already has specific statutes that identify and prohibit false statements in both candidate and referendum campaigns. O.R.C. §§ 3599.091(B) and 3599.092(B).[4] These statutes explicitly address fraudulent attacks on individuals during the electoral process. However, the same cannot be said of a disclosure requirement imposed on unsigned leaflets distributed during a referendum election campaign.

Election fraud statutes cannot be applied to referenda in the same way that they can be applied to candidate elections. Referendum elections are distinctive. Typically the issue to be voted on in the referendum is printed on the ballot in its entirety and is readily available to the electorate prior to

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[3]Moreover, even if the opinion of the Ohio Supreme Court had narrowed section 3599.09, that construction would not "restore constitutional validity to a conviction that occurred . . . under the ordinance as it was written." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 155 (1969). Both the Commission and the amicus brief for the Council of State Governments erroneously suggest that the petitioner should not be challenging section 3599.09 because she testified that she intended to sign her leaflets and therefore did not appear to fear retaliation. Whether or not the petitioner intended to put her signature on her leaflets is beside the point. The central thrust of the petitioner's position is that § 3599.09 is unconstitutional on its face because of its substantial overbreadth. She was fined for violating it and is therefore entitled to challenge its validity. *Broadrick v. Oklahoma*, 413 U.S. 601, 609-611 (1973); *Forsyth County, Georgia v. The Nationalist Movement*, 112 S.Ct. 2395, 2400-2401 (1992). Moreover, there is evidence that there may have been subsequent retaliation for the distribution of the leaflets in the record. Ohio Supreme Court Justice Craig Wright outlined the indications of retaliation in his dissenting opinion below. (Pet. App. 10)

[4]These provisions are set out in Brief of Petitioner, 37-39, n.13.

the election. To the extent that the precise terms of the referendum issue are known to all, the terms speak for themselves. Thus, the voters in any school tax referendum election can read the proposition to be voted on to determine whether they will vote to increase taxes.

In both candidate and public issue elections, there is a large universe of speech that occurs in the political marketplace. Much campaign discourse is unidentified; even fully attributed speech may mislead. Under such circumstances, the traditional remedy in the political marketplace of ideas is to rebut false statements with true ones. *Texas v. Johnson*, 491 U.S. 397, 419 (1989) (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

Because § 3599.09 is not confined to fraudulent attacks on political candidates, it would appear that the state's actual interest in § 3599.09 is in informing referendum voters about the referendum issue in the way that the state deems best. (Resp. Br. 26-27). Thus, in Ohio, the legislature has taken it upon itself to decide that voters must know the names and addresses of all speakers who choose to communicate their message by leaflets and similar means. (Resp. Br. 24). However, the state's interest in specifying how the electorate is to be informed clashes with the Bill of Rights. This is because the First Amendment does not allow the enforcement of legislation designed to compel political speakers to communicate specified information that the State of Ohio believes to be useful. State compelled speech has long been disapproved by this Court. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *Wooley v. Maynard*, 430 U.S. 705 (1977).

B. This Court's campaign financing decisions do not support the Commission's claim that § 3599.09 can be justified as a means of voter education.

In an effort to persuade this Court that the § 3599.09 ban on anonymous referendum campaign leaflets is constitutional, the Commission relies on *Buckley v. Valeo*, 424 U.S. 1 (1976). In particular, the Commission contends that *Buckley*'s approval of campaign expenditure and contribution disclosure requirements supports the Ohio Supreme Court's holding with respect to leafletting in public places. (Resp. Br. 23).

The Commission's heavy reliance on *Buckley* is based on a misreading of that case. There is no indication in the *Buckley* opinion that the disclosure requirements it upheld extend beyond financial disclosures. Every governmental interest accepted as sufficiently important to justify disclosure of contributions and expenditures is stated in terms of financial interest. *See* 424 U.S. at 66-68 (where money comes from and how it is spent; deterrence of corruption by exposing large contributions and expenditures; means of gathering data to detect violations of contribution limitations); 424 U.S. at 80-81 (informational interest in expenditures advocating election or defeat of clearly identified candidates).

Employing a "strict standard of scrutiny," 424 U.S. at 75 to review § 434(e), which mandated disclosure of independent expenditures exceeding $100, the *Buckley* Court was careful to emphasize that the statute governed campaign spending explicitly related to candidates for public office. Without such a limitation to expenditures expressly advocating election or defeat of particular candidates, the Court recognized that even financial disclosure requirements could be

"treacherous" in deterring "those who seek to exercise protected First Amendment rights." 424 U.S. at 76-77.

The Commission also contends that *Buckley*'s approval of contribution and expenditure disclosures validates the constitutionality of § 3599.09 as a means to educate the electorate. Thus it argues that § 3599.09 enables voters to "judge the precise effect of a [ballot] measure by knowledge of those who advocate or oppose its adoption. . . . " (Resp. Br. 13). In making this argument, the Commission treats *Buckley* as though the case found a power in government to regulate the content of election debate rather than to protect against the potential for corruption and manipulation created by financial contributions and expenditures. On the contrary, this Court's decisions disapproving bans on electioneering editorials on election day make clear that the First Amendment forbids laws regulating the content of election-related publications in order to assure that voters will be informed about elections in a fashion that the government believes is best. *See Mills v. Alabama*, 384 U.S. 214 (1966) (voids statute prohibiting election day editorials urging voters to vote in a particular way).[5]

Moreover, the Commission's claim that § 3599.09 is a means to assure an informed electorate contradicts the rest of the Ohio Election Code. In fact, while campaign committees, political action committees, and political parties are required to disclose expenditures, there is no comparable provision in the Ohio Election Code that creates a duty for individuals to disclose the kind of financial information that would truly enable voters to identify persons who are making

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[5]This Court has rejected the notion that restricting or inhibiting the flow of information contributes to an informed electorate. *Anderson v. Celebrezze*, 460 U.S. at 798; Brief of Petitioner 33-34.

the unusually large independent expenditures that have the capacity to be unduly influential.[6]

Thus, § 3599.09 obliges a citizen-leafletter like Mrs. McIntyre to put her name on the comparatively few anti-tax leaflets that she could afford to have printed for public distribution. Yet, an extremely wealthy private citizen who is expending thousands of dollars to print leaflets to express opposing views is also required to place his name on each leaflet. He is not required to disclose the fact that he has expended vast amounts of money. Thus, the reader of each leaflet learns only the name of the responsible person and is unable to judge whether any of the participants in the debate over the referendum is actually playing a role that might possibly distort the debate.

The Commission makes much of the fact that *Buckley* distinguishes *Talley v. California*, 362 U.S. 60 (1960). (Resp. Br. 23-24). However, it is no surprise that the *Buckley* Court did not apply *Talley*'s protection of anonymous streetcorner leafletters to the campaign financing provisions of the Federal Election Campaign Act. In contrast to the *Talley* ordinance and the Ohio statute, the federal act is designed to remedy problems created by the huge sums of money contributed and expended during federal elections of candidates for public office. The Act was not designed to regulate the activities of a lone streetcorner leafletter. In fact, the *Buckley* Court went out of its way to protect speakers "engaged purely in issue discussion." 424 U.S. at 79.[7]

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[6]*See* Ohio Revised Code § 3517.10.

[7]Additionally, contrary to the Commission's assertion that *Buckley* sustained a disclosure threshold of $10, *Buckley* actually sustained distinct thresholds for recordkeeping and for disclosure. The $10 requirement identified in the Commission's brief established the threshold for

The Commission's reliance on *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), is equally misplaced. *Bellotti* invalidated a flat ban on corporate expenditures for the purpose of "influencing or affecting" the outcome of a ballot issue. Notwithstanding the fact that *Bellotti* is a campaign financing case, the Commission makes much of footnote 32 in *Bellotti*, also relied on by the Ohio Supreme Court, which suggests the possibility of financial disclosure requirements for business corporations expending resources to support or oppose passage of a ballot issue. 435 U.S. at 791-792 n.32.

The Commission fails to acknowledge that central to the disclosure issue addressed in the *Bellotti* footnote is the concern that a massive infusion of business corporation funds into a referendum campaign will have a disproportionate effect on the outcome. This is because private adversaries of the corporation's political position may not have matching resources to reply. 435 U.S. at 809 (White, J., dissenting). Footnote 32 merely suggests that large corporate expenditures during a political campaign are less likely to have an unfair impact if the voters are aware of the fact that significant

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recordkeeping by the recipients of political contributions. A larger $100 threshold was established for required disclosure of campaign contributions and expenditures. (Resp. Br. 39).

Moreover, since *Buckley*, the threshold for disclosure of independent expenditures has been increased in 2 U.S.C. § 434(c)(1) to $250, far more than the costs of production and distribution of a few leaflets by a lone streetcorner leafletter.

Under the Ohio Election Code, there is a threshold of $25 for reporting campaign committee contributions and expenditures. Ohio Op. Atty. Gen. No. 75-068 (1975). Unfortunately, no such threshold protects independent referendum leafletters like Mrs. McIntyre.

corporate financial expenditures on behalf of a particular electoral outcome have been made.[8]

C. The Commission's assertion that there is no current need for anonymous political leafletting is wrong.

The Commission argues that America no longer needs to protect anonymity in political discourse because there is no risk of seditious libel prosecutions. (Resp. Br. 30-34). In making this argument, the Commission misses the point. Section 3599.09 imposes a disclosure requirement which, because it applies to lone protestors handing out their election-related leaflets in public places, inevitably creates the worry about retaliation in one form or another. Public officials may choose to respond by finding ways to retaliate; private citizens who strongly disagree may, in some cases, stoop to harassment.

In fact, § 3599.09 facilitates the kind of retaliation or harassment that a lone protestor has legitimate reason to worry about. An independent citizen who leaflets in public places must put her name and home or business address on the leaflet. In contrast, if the same leaflet is sponsored by a political organization or a political party, then it only need contain the name and business address of the organization's chairman, treasurer or secretary. As a practical matter, what this means is that leaflets distributed by established political organizations can be identified by means that do not require

[8]On the other hand, there are circumstances in which a trivial corporate expenditure would be too small to trigger such a concern that the corporation's expenditure would have a meaningful impact on the outcome of a referendum. In such a case, one presumes that the same limits on reporting minimal contributions that protect the privacy of small personal contributions and expenditures would also apply to corporate expenditures.

the responsible party officials to publicly disclose their home addresses. In contrast, private citizens like Mrs. McIntyre who cannot shield themselves behind a business address must be willing to give their home addresses as well as their names and thereby run the risk of hostile responses directed at their homes.

III. SECTION 3599.09 IS UNCONSTITUTIONAL AS APPLIED.

The Commission's brief does not directly address the petitioner's argument that the § 3599.09 disclosure requirement is unconstitutional as applied to leaflets communicating her opinions and advocating defeat of a referendum on a school tax levy. In a distortion of the record in this case, the brief suggests that, at the original hearing, the Commission had the question of fraud before it. (Resp. Br. 2). The Commission's brief also contains the assertion that, in addition to banning anonymous election-related leafletting, § 3599.09 "prohibits the 'attribution statement' from being false or fraudulent." (Resp. Br. 6).

Neither of these assertions is true. The sole issues considered and determined at the Commission's original hearing in this case were whether the petitioner's name and address appeared on her leaflets and whether she had violated filing and reporting requirements. She was not charged with fraud nor was she guilty of fraud.[9]

The Commission's innuendo of election fraud is based upon the reference "Concerned Parents and Taxpayers" in

[9]Charges against Mrs. McIntyre for violating Ohio Revised Code § 3517.10(D) (failure to file a designation of treasurer) and § 3517.13(E) (failure to file a PAC report) were dismissed.

petitioner's anonymous leaflets. (JA 6-7, 36-39). The Commission's assertion that petitioner McIntyre put the name of a "fictitious organization" on her leaflets distorts the record. (Resp. Br. 1). The record shows that the reference to "Concerned Parents and Taxpayers" is not a reference to an organization. On the contrary, as Mrs. McIntyre explained in response to questions of a commissioner, it is a reference to the fact that the petitioner, a parent of Westerville public school students, believed that her leaflets expressed not only her views, but the views of other like-minded parents and taxpayers with whom she had communicated. (J.A. 38-39). Such allusions to like-minded citizens are common and do not, by themselves, create formal political organizations.[10] Thus, in *Colten v. Kentucky*, 407 U.S. 104 (1972), when Justice Douglas used the terms "We the people" and "We Americans," he could hardly have been accused of speaking fraudulently on behalf of fictitious groups. 407 U.S. at 122 (Douglas, J., dissenting).

Even if Mrs. McIntyre's leaflets were literally within the coverage of § 3599.09, the statute cannot be constitutionally applied to cover this form of political speech. This Court made this point clearly in *Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 265 (1986): "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation."

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[10]*See*, for example, *State of Ohio, ex rel. Taft v. Court of Common Pleas of Franklin County*, 63 Ohio St.3d 190, 586 N.E.2d 114 (1992) (reapportionment advocacy group not a PAC; *United States v. National Committee for Impeachment*, 469 F.2d 1135, 1140 (2d. Cir. 1972) (publication of advertisement by committee seeking impeachment of the president did not alone make the committee a "political committee").

Finally, the Commission's claim that the § 3599.09 disclosure requirement prohibits false and fraudulent attribution statements is equally specious. Section 3599.09 is a ban on all anonymous election-related leaflets and similar materials. It contains no reference to false or fraudulent information of any kind. Other sections of the Ohio Elections Code, not charged or applied in this case, prohibit false and fraudulent statements.[11]

CONCLUSION

For the foregoing reasons and the reasons stated in the petitioner's initial brief, this Court should reverse the decision of the Ohio Supreme Court and hold that § 3599.09 is unconstitutional on its face and as applied here.

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[11]*See* footnote 4, *supra*.

No. 93-986

In The

Supreme Court of the United States

October Term, 1993

JOSEPH McINTYRE,

Petitioner,

v.

OHIO ELECTIONS COMMISSION,

Respondent.

On Writ Of Certiorari
To The Supreme Court Of Ohio

BRIEF OF AMICI CURIAE FOR THE STATES OF TENNESSEE, ET AL., IN SUPPORT OF RESPONDENT

INTEREST OF AMICI CURIAE

At least 44 states and the District of Columbia presently have in effect some form of a political advertising disclosure statute similar to the Ohio statute at issue in this case. *See* Disclosure Statutes For Political Literature, Appendix, A-1 *et seq*. Although the language in these disclosure statutes may vary, the interest in an informed electorate remains constant. Accordingly, because of the potential applicability of a determination made here to the laws in other states, the Amici States advocate

upholding the constitutionality of Ohio Rev. Code § 3599.09 (Ohio law).

Political advertising disclosure statutes advance the important state interest in informing the electorate. The interest in providing information to voters is important because it reflects the First Amendment goal of disseminating information in order to permit the intelligent exercise of the right to vote. *See* "Developments in the Law – Elections," 88 Harv. L. Rev. 1111, 1290 (1975). Pre-election poll results often indicate the importance of undecided voters in determining the outcome of elections. Some of these voters do not make up their minds until they enter the voting booth. While voters may be informed regarding the big issues and major candidates (via the media and other means), they are often undecided about – or unaware of – less visible officers and ballot questions. Therefore, election day advocacy on these matters has the potential for a major impact on voter choices since reluctant or undecided voters are often easily swayed at the last minute. *See* W. Flanigan, *Political Behavior of the American Electorate*, p. 154 (2d ed. 1972).

In addition, large shifts in voter sentiment have been reported to occur more often during ballot elections than in candidate elections. *See* D. Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States*, p. 172 (1984). These facts highlight the importance of providing voters with information regarding the source of political communication so that they may be in a better position to evaluate its validity and vote accordingly. Therefore, the

Amici States join in urging this Court to affirm the decision of the Ohio Supreme Court upholding the constitutionality of the Ohio law.

ARGUMENT

The decision of the Ohio Supreme Court to uphold the constitutionality of the Ohio law, which requires the disclosure of publishers of campaign literature pertaining to the adoption or defeat of ballot propositions, against a First Amendment challenge should be affirmed. Clearly, this statute meets the standard of reasonableness for regulation of elections. Even if this Court were to apply strict scrutiny, the statute would still pass constitutional muster because the state interests in such a disclosure law are compelling and the statute is narrowly tailored to meet those interests.

I. Ohio Revised Code § 3599.09 Should Be Evaluated Under A Standard Of Reasonableness.

Constitutional challenges to state election laws should be analyzed under a more flexible standard of review. In *Anderson v. Celebrezze*, 460 U.S. 780 (1983), this Court set forth a more relaxed standard of review to be applied in resolving constitutional challenges to state election laws. Under this flexible standard, the court first balances the character and magnitude of the asserted injury against the rights protected by the First and Fourteenth Amendments. *Id.* at 788. The Court then identifies and evaluates the precise interests asserted by the state, including the legitimacy, strength, and necessity of those

interests, to determine if the interests justify the burden imposed by the statute. *Id.* at 788.

The flexible standard of review should be applied to election laws because it is necessary to assure that states are not hobbled in their efforts to regulate elections to protect what this Court has found to be the most fundamental right – the right to vote. *Burson v. Freeman*, 112 S.Ct. 1846, 1851 (1992) ('the right to vote freely for the candidate of one's choice is of the essence of a democratic society' *quoting Reynolds v. Sims*, 377 U.S. 533, 555 (1964)). In the present case, the burden that the Ohio law imposes on the petitioner's expressive activity does not outweigh Ohio's interests in fair election practices and an informed electorate. As a practical matter, there must be regulation of elections if they are to be conducted fairly and if the voters are to cast their votes intelligently and effectively. *Storer v. Brown*, 415 U.S. 724, 730 (1974).

Under the more flexible standard, the nature of the constitutional inquiry depends upon the extent to which the Ohio law infringes upon the petitioner's constitutionally-protected right. *Anderson v. Celebrezze*, 460 U.S. at 788. In the past, this Court has recognized that when a state election law only imposes a reasonable, nondiscriminatory restriction upon the protected right, the state's important regulatory interests are generally sufficient to justify the restriction. *Burson v. Freeman*, 112 S.Ct. at 1858; *Storer v. Brown*, 415 U.S. at 733. Requiring the identification of those circulating pamphlets to influence a ballot issue constitutes just such a reasonable and nondiscriminatory restriction since it neither impacts the content of the speech nor suppresses it. The procedural

burden of source disclosure is more than counterbalanced by Ohio's state interest in an informed electorate.

By providing the voters, to whom the message is directed, with a means to better evaluate political propaganda, the Ohio law furthers the state interest in accurate voter assessment of the issues. The end result of this reasonable, nondiscriminatory restriction is not to diminish political debate, but to encourage it by providing for additional information for use by an informed electorate. The source disclosure requirement of the Ohio law accomplishes such a purpose.

II. The State Interests In Political Advertising Disclosure Laws Are Sufficiently Compelling And Narrowly Tailored To Survive Strict Scrutiny.

Even if this Court determines that the disclosure statute is subject to strict scrutiny, the state interests are sufficiently compelling to justify the minimal intrusion on the petitioner's First Amendment rights. The Ohio Supreme Court identified two state interests in requiring disclosure by publishers of political literature during candidate and/or referenda elections. First, the Ohio Supreme Court noted that "the disclosure requirement is clearly meant to 'identify those responsible for fraud, false advertising and libel.' " *McIntyre v. Ohio Elections Commission*, 67 Ohio St.3rd 391, 394 (1993), *quoting Tally v. California*, 362 U.S. 60, 64 (1960). Second, the Ohio high court, in quoting *First National Bank of Boston v. Belloti*, 435 U.S. 765, 691-92 n.32 (1978), recognized that *"identification of the source of advertising may be required as a means of disclosure, so that the people will be able to evaluate the*

arguments to which they are being subjected." McIntyre, 67 Ohio St.3rd at 395 (emphasis in original).

A number of other state appellate courts have articulated similar state interests in such a disclosure requirement:

(1) "A state has a strong and valid interest in preserving the integrity of the electoral process." *State v. Acey,* 633 S.W.2d 306, 307 (Tenn. 1982).

(2) Such disclosure statutes "ensure that voters have information which will aid them in assessing the bias, interest, and credibility of the person or organization disseminating the information about political candidates, and determining the weight to be given a particular statement." *Acey,* 633 S.W.2d at 307.

(3) "[T]he obvious purpose of [Kentucky Revised Statute] § 121.190(1) is to promote honesty and fairness in the conduct of election campaigns." *Morefield v. Moore,* 540 S.W.2d 873, 874 (1976).

(4) The statute "is an attempt to raise the ethical standards of political discussion to promote fair play and fair competition in politics, to banish cowards from the political arena, and extirpate the dirty business or surreptitious character assassination." *Commonwealth v. Evans,* 40 A.2d 137, 138 (Pa. Sup. Ct. 1944).

Lower federal courts have also articulated these interests as to similar state and federal regulations. In *United States v. Scott,* 195 F. Supp. 440, 443 (D. N.D. 1961), a federal district court upheld the constitutionality of the federal statute, 18 U.S.C. § 612, which requires disclosure

of publishers of campaign materials in federal elections, and recognized that:

> The Congress determined that in certain specified instances the writers of pamphlets must disclose their identity. And why was this done? So that the electorate would be informed and make its own appraisal of the reason or reasons why a particular candidate was being supported or opposed by an individual or groups.

Id. at 443. *See also, KVUE, Inc. v. Moore,* 709 F.2d 922, 937 (5th Cir. 1983) (Texas sponsorship requirements are "generally applicable and even-handed regulations that protect the integrity and reliability of the electoral process itself.")

Disclosure is justified by the state's interest in providing voters with a means to better evaluate the contents of political literature. Ohio's interest in assuring accurate voter assessment of political issues is compelling, especially in light of the fact that this interest is furthered by opening the channels of communication rather than restricting them. In *Burson v. Freeman,* 112 S.Ct. at 1851, this Court recognized that the State of Tennessee's interest in protecting its citizens' right to vote was a compelling one. Ohio's election statute continues in this tradition of protecting the right to vote by safeguarding the ability of its citizenry to make intelligent and informed decisions.

If the state's infringement on speech is to be scrutinized, so must the individual speaker's infringement on the right to vote by making an informed decision. This

Court has acknowledged that the unnecessary infringement on the right to vote is not to be tolerated in cases of incidental speculative impact on First Amendment rights: "Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. at 555. Therefore, since the interests that the Ohio law seeks to preserve are compelling, they warrant the constitutional validation of the statute even under strict scrutiny.

The petitioner claims that none of the justifications for the disclosure requirement are "sufficient to uphold Ohio's ban on all anonymous campaign literature." Petitioner's Brief, pp. 29-30. In contrast, this Court has recognized that preservation of the integrity of electoral process is a compelling state interest. *American Party v. White*, 415 U.S. 767, 782 n.14 (1974); *see also, Anderson v. Celebrezze*, 460 U.S. at 789 n.9 (1983). Indeed, this Court, in *Storer v. Brown*, 415 U.S. at 730, acknowledged that "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos is to accompany the democratic process."

Perhaps the most misleading aspect of the petitioner's argument is the characterization of the Ohio law as a "flat ban on distribution of anonymous leaflets." Petitioner's Brief, "Statement of the Issues." The Ohio law, like other similar state election laws, does not ban political speech. Rather, it requires disclosure of the person publishing such campaign literature in either candidate or referenda elections.

This Court in *Buckley v. Valeo*, 424 U.S. 1 (1976) upheld the constitutionality of the disclosure requirements in the Federal Election Campaign Act of 1971 as amended in 1974. In upholding the constitutionality of these disclosure requirements, this Court justified any minimal intrusion upon First Amendment rights by a governmental interest remarkably similar to the one asserted to justify the disclosure requirements of the Ohio law and other similar state election laws. Three specific interests were articulated:

> First, disclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.
>
> Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. . . .
>
> Third, and not least significant, recordkeeping, reporting and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above.

Buckley, 424 U.S. at 67-68. If a law requiring detailed disclosure of campaign contributions and expenditures

by political candidates and/or political action committees is justified by these governmental interests, then it follows that a less-intrusive law requiring disclosure of the name and address of the publisher of campaign literature in candidate or referenda elections is also justified by those same interests.

In addition, the state interests in enforcing its campaign financial disclosure law, which have been recognized as compelling interests by this Court in *Buckley*, 424 U.S. at 67-68, are furthered by a requirement that campaign literature include the name of the publisher of the literature. In *Bemis Pentecostal Church v. State*, 731 S.W.2d 897 (Tenn. 1987), a group of churches in Jackson, Tennessee opposed a liquor-by-the-drink referendum and spent money publishing advertisements which opposed the referendum in the local newspaper. In compliance with Tennessee's requirement that the publisher of campaign advertisements be disclosed, the advertisement "identified the sponsoring church." *Bemis Pentecostal Church*, 731 S.W.2d at 899. Based on this information, local election officials determined that these churches had failed to file their campaign financial disclosure statements in compliance with Tennessee's Campaign Financial Disclosure Law. If it were not for the churches' compliance with the requirement to disclose the publisher of the advertisement, the Campaign Financial Disclosure Law in Tennessee would have gone unenforced in that instance.

As to the alleged constitutional infirmities of the Ohio Law, the petitioner contends that the statute is not narrowly drawn to further the state interests articulated by the Ohio Supreme Court. Petitioner's Brief, pp. 35-39. Specifically, the petitioner focuses upon the state interest

in prohibiting fraudulent, false or libelous statements. *Id.* at 36. Such an argument ignores other articulated state interests, including perhaps the most basic and fundamental interest recognized by this Court in *Buckley* and a number of lower courts previously cited – namely, to inform the electorate "as to where political campaign money comes from and how it is spent." *Buckley*, 424 U.S. at 67; *Acey*, 633 S.W.2d at 307; *Scott*, 195 F. Supp. at 443. Without such a disclosure requirement, voters have no way of knowing who published particular campaign leaflets handed to them on election day as they prepare to vote. The Ohio law, like other similar state election laws, is narrowly tailored to further the state interest in providing voters with such information so that they may make an informed decision.

The petitioner argues in the alternative that, even if the Ohio statute is facially valid, it cannot be constitutionally applied to the "distribution of anonymous leaflets opposing passage of a referendum on a school tax levy." Petitioner's Brief, p. 39. In *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 299-300 (1981), this Court, in striking down a limitation on contributions and referenda elections, acknowledged that, in the context of a referenda election, "the integrity of the political system will be adequately protected if contributions are identified in a public filing revealing the amounts contributed." Likewise, lower courts have upheld the constitutionality of campaign financial disclosure requirements in the context of referenda elections. *See Bemis Pentecostal Church*, 731 S.W.2d at 907 ("The act serves a number of legitimate and compelling state interests, ranging from the maintenance of free, open, and fair elections, to dissemination of

campaign information to voters, to prevention of corruption and fraud, to records-keeping to permit effective enforcement of the Act.")

Ensuring that the electorate is fully informed in referenda elections is perhaps even more important than in candidate elections. Surveys have shown that voters are more likely to change their minds in referenda elections than candidate elections:

STABILITY OF VOTING INTENTIONS
IN CALIFORNIA CANDIDATE
AND PROPOSITION CONTESTS, 1960-82

Change In Voting Intentions	Type of Election: Candidate		Proposition		Total	
Little[a]	77%	(27)	28%	(10)	51%	(37)
Moderate[b]	11	(4)	19	(7)	16	(11)
Significant[c]	14	(5)	53	(19)	33	(24)

Source: California Polls, 1960-82, The Field Institute, San Francisco, California.

[a]Roughly the same margin of preferences persisted throughout the campaign.

[b]There were significant changes in the margin of preferences, but the side that led all along won.

[c]There were significant changes in voting intentions as the campaign preceeded; the side that had at one time been far behind won.

Magleby, *Direct Legislation: Voting on Ballot Propositions in the United States* (1984) p. 172.

With 53% of the voters in referenda elections making a significant change in their voting intentions as the campaign proceeds, there is no doubt that last minute leaflets handed out to voters at the polling place may have a significant impact on a voter's decision. These facts highlight the necessity of the Ohio law as applied to referenda elections, which requires disclosure at a crucial moment in the election process. Thus, the Ohio law is narrowly tailored to further the state's compelling interest in an informed electorate.

CONCLUSION

The Amici States urge this Court to affirm the decision of the Ohio Supreme Court upholding the constitutionality of the Ohio statute requiring disclosure of the publishers of campaign literature distributed in candidate and referenda elections.

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DISCLOSURE STATUTES FOR POLITICAL LITERATURE

State	Candidate	Referendum	Pamphlets Handbills Circulars	Periodicals Newspapers	TV or Radio
Alabama (§17-22A-13)	Yes		Yes	Yes	Yes
Alaska (§15.56.010)	Yes	Yes	Yes	Yes	Yes
Arizona (§19-128; §16-912)	Yes	Yes	Yes	Yes	Yes
Arkansas (§7-1-103)	Yes	1	Yes	Yes	
Colorado (§1-13-108)	Yes	2	Yes	Yes	
Connecticut (§9-333w)	Yes	Yes	Yes	Yes	
Delaware (15:§8023)	Yes	No	Yes	Yes	Yes
Washington, D.C. (§1-1420)	Yes	Yes	Yes	Yes	
Florida (§106-143/1437/144)	Yes	3	Yes	Yes	Yes
Georgia (§21-2-415)	Yes	Yes	4	Yes	
Hawaii (§11-215)	Yes		5	6	Yes
Idaho (§67-6614A)	Yes	Yes	Yes	Yes	Yes
Illinois (10:§5/29-14)	Yes	Yes	Yes	Yes	
Indiana (§3-14-1-4)	Yes	Yes	7	Yes	Yes
Iowa (§56.14)	Yes	Yes	Yes	Yes	
Kansas (§25-4156)	Yes			Yes	Yes
Kentucky (§121.90)	Yes		Yes	Yes	Yes
Louisiana (18:§1463)	Yes	Yes	Yes	8	Yes
Maine (21:§1575)	Yes	Yes	Yes		
Maryland (33:§26-17)	Yes		9		
Michigan (§169.247)	Yes	Yes	Yes	Yes	Yes
Minnesota (§211B.04)	Yes	Yes	10	Yes	Yes
Mississippi (§23-15-899)	Yes		Yes	Yes	Yes
Missouri (§130.031)	Yes	Yes	Yes	Yes	Yes
Montana (§13-35-225)	Yes	Yes	Yes	Yes	Yes
Nebraska (§49-1474.01)	Yes	Yes	Yes	11	Yes
Nevada (§294A.320)	Yes	Yes	Yes	Yes	Yes
New Hampshire (§664:14)	Yes	Yes	Yes	Yes	Yes
New Jersey (§19:34-38.1)	Yes	Yes	Yes	Yes	
New Mexico (§1-19-16/17)	Yes	Yes	Yes		
North Carolina (§163-274)	Yes		Yes	Yes	

State	Candidate	Referendum	Pamphlets Handbills Circulars	Periodicals Newspapers	TV or Radio
North Dakota (§16.1-10-04.1)	Yes	12	Yes	Yes	Yes
Ohio (§3599.09)	Yes	Yes	Yes	Yes	Yes
Oklahoma (21:§1840)	Yes	Yes	Yes	Yes	Yes
Oregon (§260.522)	Yes	Yes	Yes	Yes	Yes
Rhode Island (§17-23-1/2)	Yes	Yes	Yes	Yes	
South Carolina (§8-13-1354)	Yes	Yes	Yes		Yes
South Dakota (§12-25-4.1)	Yes	Yes	Yes		Yes
Tennessee (§2-19-120)	Yes	Yes	Yes	Yes	Yes
Texas (15:§255.001)	Yes	Yes	Yes	Yes	Yes
Utah (§20-14-24)	Yes			Yes	
Vermont (35:§2022)	Yes	Yes	Yes	Yes	
Virginia (§24.2-1014)	Yes	Yes	Yes	Yes	Yes
Washington (§42.17.510)	Yes	Yes	Yes	Yes	Yes
West Virginia (§3-8-12)	Yes		Yes	Yes	
Wisconsin (§11.30)	Yes		Yes	Yes	Yes
Wyoming (§22-25-110)	Yes		Yes	Yes	Yes

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1. "any printed material of a political nature"
2. "relating to any issue"
3. "any advertisement intended to influence public policy"
4. "distribute . . . circulate . . . disseminate"
5. "circulated, distributed"
6. "published"
7. "circulates"
8. "publish"
9. "campaign material"
10. "circulated"
11. "printed matter"
12. See decisions under prior law

No. 93-986

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

JOSEPH MCINTYRE,
Executor,
Petitioner,
v.
OHIO ELECTIONS COMMISSION,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether Ohio Rev. Code § 3599.09(A), which requires that election materials distributed to the public identify the source of the material, violates the First Amendment.

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INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. Among the States' important interests is "the power to regulate their own elections." *Burdick v. Takushi*, 112 S. Ct. 2059,

2063 (1992). Such regulation is essential to conducting fair elections which are free of fraud and in which an informed electorate can participate.

Ohio's requirement that election materials distributed to the public identify the source of the material serves the compelling state purposes of fostering an informed electorate and preventing election fraud, and is narrowly tailored to serve those purposes within the election context. Similar laws have long existed in many States. *See* Br. *Am. Cur.* State of Tennessee, *et al.* 1 & App. A-1-A-2 (indicating that disclosure statutes similar to Ohio's are in force in almost every State); *Talley v. California*, 362 U.S. 60, 70 n.2 (1960) (Clark, J., dissenting) ("[t]hirty-six States have statutes prohibiting the anonymous distribution of materials relating to elections").

Moreover, source identification requirements are part of a larger body of election reporting and disclosure requirements important to all States. *See, e.g.*, Herbert E. Alexander, *Financing Politics: Money, Elections, and Political Reform* 127-29 (4th ed. 1992) (Table 7-1) (indicating that all fifty States have campaign disclosure requirements); *see generally*, Federal Election Commission, *Campaign Finance Law 92* (1992) (discussing statutory requirements in each State). Thus, the invalidation of Ohio's source identification requirement could not only jeopardize source identification laws in many other States, but could also call into question other election disclosure laws which limit anonymity in campaign contributions, expenditures, and communications.

Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

STATEMENT

Amici adopt respondent's statement of the case and provide only the following discussion of points relevant to *amici*'s argument.

1. On two separate occasions during the week preceding a primary election, Margaret McIntyre[2] distributed flyers opposing a school tax levy which had been placed on the ballot in Westerville, Ohio. Pet. App. A-1. She distributed these flyers to attendees at meetings held at two public schools in Westerville to discuss the proposed levy. McIntyre's flyers expressly advocated a specific election result: a "No" vote on Issue 19, the School Tax Levy. *See* Pet. App. A-38 - A-39. Although some of these flyers contained McIntyre's name and address, Pet. App. A-31, others did not, and thus failed to comply with Ohio Rev. Code 3599.09(A), which requires such source identification. *See* Pet. App. A-1. These flyers indicated only that they were authored by "Concerned Parents and Tax Payers." *See* Pet. App. A-38 - A-39.

According to McIntyre, these nonconforming flyers were mistakenly distributed along with otherwise identical flyers which did contain her name and address in compliance with Ohio law. *See* J.A. 12, 36-40. McIntyre explained in correspondence to the Ohio Elections Commission (OEC) and in testimony before the OEC that she intended all of the flyers to have contained her name and address, in conformance with Ohio law. *See* J.A. 39 ("[T]he ones I passed out, to the best of my knowledge, all of them had my name on them, all of them. I wouldn't have passed it out without my name on it."); J.A. 12 ("At no time was there any intent to hide my identity . . . ."). McIntyre indicated that the nonconforming flyers were distributed as the result of an administrative error in copying, printing, or compiling the flyers for dis-

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[2] Although Joseph McIntyre, Executor, has been substituted as the named petitioner in this case, *amici* refer to the original petitioner, Margaret McIntyre, in this brief.

tribution. *See* J.A. 12, 36-40. A copy of the conforming version of the flyer, which included McIntyre's name and address, was attached to McIntyre's correspondence to the OEC. *See* J.A. 12, 36-37.

2. After a hearing, the OEC found that some of the materials distributed by McIntyre were not in compliance with § 3599.09(A). It accordingly fined her $100 for violating the Ohio law. Pet. App. A-40. McIntyre never alleged that she suffered any other adverse consequences as a result of her leafletting.

SUMMARY OF ARGUMENT

1. While Ohio's requirement that the source of campaign materials be identified implicates important First Amendment interests, *see Talley v. California*, 362 U.S. 60 (1960), that observation marks only the starting point of constitutional analysis. This Court's precedents establish that competing public interests served by restrictions on anonymity can be "sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved." *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (per curiam) (quoting *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 97 (1961)). Accordingly, the Court has upheld election laws which limit anonymous speech and association. *See, e.g., Buckley*, 424 U.S. at 60-84.

2. Ohio's source identification requirement serves two vital public interests: fostering an informed electorate, and preventing fraud in the election process. Both of these interests have been recognized as legitimate and compelling. *See, e.g., Buckley*, 424 U.S. at 66-67; *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983); *Burson v. Freeman*, 112 S.Ct. 1846, 1851, 1852 (1992) (plurality opinion). Bringing the source of communications to light is particularly important in the context of ballot measures, where vast spending imbalances carry a

significant potential for confusing and misleading voters. *See Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 307-09 (1981) (White, J., dissenting).

These compelling interests outweigh any burden the Ohio statute may place on the First Amendment interests of speakers. This is clearly the case here, where McIntyre's own statements concerning her intention to comply with the identification statute make implausible any contention that she feared reprisals or was chilled in the exercise of her First Amendment rights.

3. Ohio's statute is narrowly tailored to serve vital public interests. It applies only within the limited context of elections, and goes no further than is necessary to provide essential information to voters and prevent campaign fraud. Neither the absence of a minimum expenditure threshold for the identification requirement, nor the limited regulatory exemptions for buttons, pencils, and like items, reflects an unconstitutional lack of tailoring. Both of these features of the Ohio statute reflect line-drawing based on practical realities, an endeavor best left to the legislature. *See, e.g., Buckley*, 424 U.S. at 83.

4. Disclosure and reporting laws which place limits on anonymous political activity have long been central to the protection of the integrity of state and federal elections. They represent minimally intrusive means of safeguarding the democratic process. *See Buckley*, 424 U.S. at 82. Striking down Ohio's source identification statute could call into question other election statutes, both state and federal, which limit anonymous political activity.

ARGUMENT

I. OHIO'S ELECTION STATUTE, WHICH REQUIRES IDENTIFICATION OF THE SOURCE OF CAMPAIGN MATERIALS DISTRIBUTED TO THE GENERAL PUBLIC, DOES NOT VIOLATE THE FIRST AMENDMENT

A. Neither *Talley* Nor Any Other Decision of This Court Supports the Invalidation of Ohio's Source Identification Requirement

Ohio's requirement that election materials distributed to the public contain the source's name and address unquestionably touches upon significant First Amendment interests. *See Talley v. California*, 362 U.S. 60, 64 (1960) (noting historical significance of anonymous speech); *see also Buckley v. Valeo*, 424 U.S. 1 (1976). But petitioner's interest in anonymous political speech is not the only interest that must be considered in this case.

Neither *Talley* nor any other decision of the Court suggests that the First Amendment guarantees speakers anonymity in all circumstances, particularly where weighty interests of other members of the public are at stake. Specifically, the Court has held that disclosure requirements which place limits on anonymity within the context of fundamental democratic processes such as elections, and which thereby safeguard vital interests of the electorate as a whole, can be fully consistent with the First Amendment. *See, e.g., Buckley*, 424 U.S. at 66-72, 80-82 (upholding disclosure requirements for campaign contributions and independent expenditures); *United States v. Harriss*, 347 U.S. 612, 625-26 (1954) (upholding reporting requirements imposed on lobbyists).

As the Court explained in a related context, recognition that important First Amendment liberties are implicated is only the first step in constitutional analysis:

> To state that individual liberties may be affected is to establish the condition for, not to arrive at the conclusion of, constitutional decision. Against the

> impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve.

Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 91 (1961). The constitutional validity of a regulation such as Ohio's is tested not merely by asking whether it touches upon the speaker's First Amendment interests, but by evaluating whether the burden that it places on those interests is outweighed by the legitimate public interests that it serves.

In *Talley*, a blanket ban on "all handbills under any circumstances anywhere that do not have the names and addresses printed on them in the place the ordinance requires" was held to be too untailored and broad to serve any purported state interest, such as the prevention of fraud. 362 U.S. at 64. This sweeping ban was struck down not because anonymous literature is entitled to absolute protection under the First Amendment, but because there was no countervailing public interest to be weighed against the burden which the ban placed on First Amendment interests. Indeed, the *Talley* Court expressly declined to "pass on the validity of an ordinance limited to prevent [fraud] or any other supposed evils." *Id.*

Where such vital public interests are at stake, the Court has consistently upheld the constitutional validity of restrictions on anonymity. In *Buckley*, the Court expressly recognized that although election disclosure requirements may carry with them the potential for interference with First Amendment interests, "there are governmental interests sufficiently important to outweigh the possibility of infringement, particularly when the 'free functioning of our national institutions' is involved." 424 U.S. at 66 (quoting *Communist Party*, 367 U.S. at 97). The Court went on to distinguish the broad ordinance at issue in *Talley* from the disclosure requirement

for independent campaign expenditures, on the ground that the latter "is narrowly limited to those situations where the information sought has a substantial connection to the governmental interests sought to be advanced." *Id.* at 81. The *Buckley* Court found that the burden imposed by the disclosure requirement was "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Id.* at 82. In so finding, the Court noted that "disclosure requirements—certainly in most applications—appear to be the least restrictive means of curbing the evils of campaign ignorance and corruption that Congress found to exist." *Id.* at 68. *See also Burroughs v. United States*, 290 U.S. 534 (1934) (upholding disclosure requirements for political contributions and expenditures).

Similarly, in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), the Court assumed the validity of an identity disclosure requirement for those contributing to committees formed to support or oppose ballot measures. There, in striking down a limit on contributions, the Court expressly relied on the efficacy of disclosure requirements as a less intrusive means of fulfilling the City's objectives. *See id.* at 298. *See also First National Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.32 (1978) (noting necessity of disclosure requirements in the context of corporate political advertising).[3] *Cf.*

[3] Contrary to petitioner's assertion, Pet. Br. 32-33, the Court's language in *Bellotti* in no way limits the validity of source identification requirements to the corporate context. Indeed, in making this point, the *Bellotti* Court relied upon *Buckley*, a case which involved disclosure requirements that were not limited to corporations. *See* 435 U.S. at 792 n.32 (citing *Buckley*, 424 U.S. at 66-67).

Moreover, it is difficult to see how a source requirement would be enforceable or would have the "prophylactic effect" the Court refers to, *see Bellotti*, 435 U.S. at 792 n.32 (citing *Buckley*, 424 U.S. at 67), if only certain categories of speakers were required to identify themselves on campaign literature; there would be no way to determine whether a given piece of literature lacking identification was in violation of such a statute without independently determining the source of the literature.

United States v. Harriss, 347 U.S. 612, 625-26 (1954) (upholding a reporting requirement imposed on lobbyists), *cited in Bellotti*, 435 U.S. at 792 n.32.

Here, the Ohio legislature has determined that requiring the identification of the source of campaign literature is necessary to safeguard the integrity of a fundamental democratic process—state elections. Given the important public interests served by the regulation, the fact that it also implicates First Amendment interests does not automatically render it invalid. On the contrary, an analysis of the compelling public interests served by Ohio's narrowly tailored identification requirement reveals that any burden placed on First Amendment interests is outweighed by the vital public interests served by the requirement. Neither *Talley* nor any other decision of this Court supports the invalidation of a state election law in such circumstances.

B. Ohio's Source Identification Requirement Satisfies This Court's Tests for Constitutional Validity

Amici agree with respondent that the Ohio Supreme Court properly applied a less stringent standard of constitutional analysis to the election regulation at issue here. *See* Resp. Br. 7-15; Pet. App. A-6 - A-8 (quoting *Burdick v. Takushi*, 112 S. Ct. 2059, 2063-64 (1992)). Yet even if petitioner were correct in contending that strict scrutiny must be applied to Ohio's source identification requirement, *see* Pet. Br. 19-22, the decision of the court below should be affirmed. This is because the statute is justified by compelling state interests that outweigh any burdens it imposes on petitioner's First Amendment interests, and is narrowly tailored to achieve those state interests.

1. *Ohio's Identification Requirement Is Justified by Compelling State Interests Which Outweigh Any Burden Placed on First Amendment Interests*

Ohio's source identification requirement serves two vital state interests which the Court has expressly recognized as compelling: informing the electorate, and preventing election fraud. These compelling interests far outweigh any burden that the identification requirement places on First Amendment interests.

a. *Ohio Has a Compelling Interest in Fostering an Informed Electorate*

Ohio's law serves the important function of informing the electorate as to the identity of persons and interests supporting and opposing specific election results. As the Court emphasized in *Anderson v. Celebrezze*, 460 U.S. 780, 796 (1983), "[t]here can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election." And, as was recently reiterated in *Burson v. Freeman*, "this Court has concluded that a State has a compelling interest in protecting voters from confusion and undue influence." 112 S. Ct. 1846, 1851 (1992) (plurality opinion); *see Eu v. San Francisco City Democratic Central Committee*, 489 U.S. 214, 228 (1989) (collecting cases).

Communications advocating a particular election outcome which are unaccompanied by proper identification carry a high potential for confusing and deceiving voters. High visibility achieved by moneyed interests through large expenditures for communications often bears no relationship to the level of public support for a candidate or ballot measure.[4] By bringing the identity of the speak-

[4] *See* J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 Colum. L. Rev. 609, 624-25 (1982); Randy M. Mastro *et al.*, *Taking the Initiative: Corporate Control of the Referendum Process Through*

ers to light, source identification requirements combat the false illusion of public support that high visibility can create. Justice White has explained this crucial function of source identification requirements in referenda:

> [B]ecause political communications must state the source of funds, voters will be able to identify the source of such messages and recognize that the communication reflects, for example, the opinion of a single powerful corporate interest rather than the views of a large number of individuals. As the existence of disclosure laws in many states suggests, information concerning who supports or opposes a ballot measure significantly affects voter evaluation of the proposal.

Citizens Against Rent Control, 454 U.S. at 308-09 (White, J., dissenting) (footnotes omitted). *See also* Thomas P. Dvorak, Comment, *State Campaign Finance Law: An Overview and a Call for Reform*, 55 Mo. L. Rev. 937, 950 (1990) ("Disclosure laws do not attempt to limit the level of influence which money plays in modern politics, but to reveal it."); Mastro, *Taking the Initiative*, 32 Fed. Comm. L.J. at 353-54 (discussing function of disclosure laws).

Requirements for the disclosure of information regarding campaign contributions and expenditures have been upheld by this Court, in part because of the vital informational function that they serve. In *Buckley v. Valeo*, the Court discussed this rationale in the context of contributions to federal candidate campaigns:

> [D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate," in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in

Media Spending and What To Do About It, 32 Fed. Comm. L.J. 316, 317 (1980).

> the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.

424 U.S. at 66-67 (footnote omitted). *See id.* at 81 (same "informational interest" served by disclosure requirements for independent expenditures).

The disclosure requirements at issue in *Buckley* pertained to federal elections, which involve only candidate votes, not "ballot measures" or referenda.[5] However, the same compelling informational interests are served by disclosure requirements applied to state ballot issues.[6] In *Bellotti,* a case involving referenda, the Court noted that "[i]dentification of the source of [political] advertising may be required as a means of disclosure, so that the people will be able to evaluate the arguments to which they are being subjected." 435 U.S. at 792 n.32. And in *Citizens Against Rent Control,* the Court expressly acknowledged the potential for voter confusion in the context of ballot measures, noting that "when individuals or corporations speak through committees, they often adopt seductive names that may tend to conceal the true identity of the source." 454 U.S. at 298. In finding that this potential for confusion did not justify Berkeley's limit on

[5] Because federal elections are not used to decide issues, the Court was able to draw a distinction between "issue discussion" and "advocacy of a political result" in interpreting the scope of federal election laws. *See Buckley,* 424 U.S. at 79. In state elections, however, "advocacy of a political result" encompasses not only candidate campaigning, but also campaigning on ballot issues.

[6] Ballot measures are fundamental to the democratic processes of virtually every State. *See* Daniel H. Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory and the First Amendment,* 29 U.C.L.A. L. Rev. 505, 508 (1982) ("Every state but Delaware employs the ballot proposition for amending the state constitution, and most states use it for approving certain additional measures, such as bond issues."). Lowenstein describes the initiative and referendum as "[t]he most conspicuous forms of direct democracy." *Id.*

contributions, the Court relied on Berkeley's disclosure requirement to inform voters as to the identity of contributors:

> Here, there is no risk that the Berkeley voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure since contributors must make their identities known under § 112 of the ordinance, which requires publication of lists of contributors in advance of the voting.

Id.[7]

Indeed, it appears that the informational function served by disclosure requirements may take on heightened significance in the context of ballot issues because of the threat of voter confusion and distorted outcomes from unbalanced spending. *See* Wright, *Money and the Pollution of Politics,* 82 Colum. L. Rev. at 622 ("The unholy alliance of big spending, special interests, and election victory is found, perhaps in its most dramatic form, in referendum contests."); *id.* at 623 ("A number of studies show that, in state after state, in election after election, massive spending and sophisticated media campaigns by special interest groups have swamped referenda that were initially favored by a majority of the voters.").[8]

Moreover, voters often require more information in the ballot measure context than they do in the context of

[7] Similarly, the Court in *Harriss* upheld reporting requirements for lobbyists on the ground that they would enable legislators to appropriately evaluate the pressures to which they were being subjected and would thereby prevent "the voice of the people" from being "drowned out by the voice of special interests seeking favored treatment while masquerading as proponents of the public weal." 347 U.S. at 625.

[8] *See also* C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech,* 130 U. Penn. L. Rev. 646, 647 n.8 (1982) (discussing imbalances in spending in connection with state ballot measures). *See generally* Lowenstein, *Campaign Spending and Ballot Propositions,* 29 U.C.L.A. L. Rev. 505; *Citizens Against Rent Control,* 454 U.S. at 308 n.4 (White, J., dissenting).

candidate elections. The California Supreme Court explained this heightened need for information in *Brown v. Superior Court:*

> A ballot measure is devoid of personality and voters who seek to judge the merits of issues by reliance on the personality of those supporting different points of view can do so only if they are made aware, prior to [the] election, of those who are the real advocates for or against the measure.

487 P.2d 1224, 1232 (Cal. 1971), *quoted in Citizens Against Rent Control,* 454 U.S. at 309 n.7 (White, J., dissenting); *see* Mastro, *Taking the Initiative,* 32 Fed. Comm. L.J. at 317.[9]

In short, it is clear that the information provided by disclosure requirements such as Ohio's serves the compelling public interest of fostering an informed electorate.

b. *Ohio Has a Compelling Interest in Preventing Election Fraud*

"The Court also has recognized that a State 'indisputably has a compelling interest in preserving the integrity of its election process.'" *Burson,* 112 S. Ct. at 1852 (plurality opinion) (quoting *Eu,* 489 U.S. at 231). Accordingly, the Court "has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process." *Id.* Ohio's requirement that the source of cam-

[9] *See also* Lowenstein, *Campaign Spending and Ballot Propositions,* 29 U.C.L.A. L. Rev. at 604 ("Several states have attempted to increase the amount and accessibility of information regarding ballot measures. Perhaps the most important device is the imposition of campaign disclosure requirements, already required [in] many states.") (footnotes omitted); *Brown,* 487 P.2d at 1233 ("A voter may reasonably seek to judge the precise effect of a measure by knowledge of those who advocate or oppose its adoption, and he may gain such knowledge only through pre-election disclosure requirements of the nature here involved.").

paign materials be identified thereon clearly furthers this compelling purpose in several ways.

First, by providing information to the public as to the source of communications, the potential for deceptive presentation of a message so as to make it appear to speak for a larger or different constituency than it actually represents is minimized.[10] Second, the disclosure requirement deters false statements by adding an element of accountability to the public distribution of campaign communications, thereby discouraging malicious falsehoods and deliberate misinformation. This function is even more important in the context of ballot issues than in candidate elections, since unlike candidates who can be expected to zealously counter any falsehoods disseminated about themselves, a ballot issue may lack a zealous advocate or opponent to monitor and correct false statements. A third and related function of the identification requirement is that it facilitates the enforcement of Ohio's other election laws prohibiting various forms of campaign fraud, by providing the name of the person responsible for each communication.

Petitioner does not dispute that the prevention of campaign fraud and abuse is a compelling state interest, *see* Pet. Br. 31, but contends that Ohio's statute is not narrowly enough drawn to achieve that end since source disclosure is required "whether or not the literature contains any false or fraudulent statements." *Id.* at 30. Yet a statute requiring disclosure of the source of a campaign communication only in those instances in which the communication contained false or fraudulent statements would plainly be unenforceable. *Cf. Buckley,* 424 U.S. at 83-84 ("[T]he enforcement goal [of disclosure requirements] can never be well served if the threshold is so high that disclosure becomes equivalent to admitting violation of the contribution limitations."). Such an evis-

[10] The fact that McIntyre represented on some of her flyers that they were authored by "Concerned Parents and Tax Payers" could have misled voters in precisely this manner. *See* Opp. 2-3.

cerated statute would certainly not have "the prophylactic effect of requiring that the source of communication be disclosed." *Bellotti*, 435 U.S. at 792 n.32 (citing *Buckley*, 424 U.S. at 67).

Petitioner also argues that the source identification requirement is unnecessary to achieve Ohio's fraud-prevention objectives because Ohio has other laws specifically directed at punishing false statements in the election context. Pet. Br. 37. But the existence of specific laws targeted at the most extreme forms of harmful conduct has never been held to preclude broader, complementary legislation that both deters that conduct and encompasses more subtle forms of harm as well.

For example, the respondent in *Burson* suggested that there was no need to protect voters from intimidation by banning campaigning within a certain radius of the polling place, since other laws already prohibited intimidation and interference with the voting process. 112 S. Ct. at 1855 (plurality opinion). The plurality found, however, that "[i]ntimidation and interference laws fall short of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections." *Id.* (quoting *Buckley*, 424 U.S. at 28). In *Buckley* the Court held that the need for limits on campaign contributions as an anti-corruption measure was not precluded by the existence of a bribery statute which targeted campaign corruption in its "most blatant" form. 424 U.S. at 28. In similar fashion, the compelling interests served by Ohio's identification requirement go beyond the specific falsehoods covered in other statutory provisions to include more subtle forms of deception and distortion.

Moreover, in *Buckley* the Court noted that one of the major purposes of the federal campaign disclosure requirements was to assist in the enforcement of other campaign laws, such as contribution limits. 424 U.S. at 67-68. Likewise, the enforcement of Ohio's statutory prohibitions of false and fraudulent campaign statements is greatly facilitated by the requirement that the source of each communication be identified. The specific false statement provisions and the broader prophylactic source disclosure requirement work together to advance Ohio's compelling interest in fraud prevention in a more comprehensive and efficient manner than either could accomplish alone.

c. *The Compelling Interests Served by Ohio's Identification Requirement Outweigh Any Burden on First Amendment Interests*

In assessing the validity of a disclosure measure that advances compelling state interests, the Court "look[s] to the extent of the burden that [it] place[s] on individual rights." *Buckley*, 424 U.S. at 68. Petitioner asserts that Ohio's disclosure statute burdens First Amendment interests in two respects: first, it "chills" speech, since some people will be reluctant to engage in speech if they know that they must identify themselves; and second, it is "content based" and amounts to compelled speech insofar as it requires the identification to appear along with the message. Pet. Br. 21. Neither contention provides an adequate basis for striking down the Ohio statute, given the compelling state interests which it serves.

While it is possible that, as petitioner contends, some persons might refrain from producing campaign materials as a result of Ohio's identification requirement, the Court has found that risk to be an insufficient basis for the blanket invalidation of comparable legislation that serves vital public interests. In *Buckley*, the Court considered the same arguments that are being raised here regarding the possibility of a "chilling" effect on First Amendment interests:

> It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who might otherwise contribute. In some instances, disclosure may even expose contributors to harassment or retaliation.

Id. at 68. Nevertheless, after weighing the public interests served by the disclosure requirements, including the

function of providing information to the electorate and "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity," *id.* at 67, the Court concluded that such disclosure requirements were generally constitutional. *Id.* at 84.[11]

The Court has recognized that in certain factual circumstances the risk associated with the disclosure of one's identity may be so great as to tip the balance in favor of nondisclosure, such as where a factual showing of a legitimate fear of public or private reprisals is coupled with a diminished state interest in the information requested. In *Buckley*, the Court acknowledged that despite the compelling interests generally served by disclosure of the source of campaign contributions, disclosure might not be warranted in the case of "a minor party with little chance of winning an election" if it appeared that "fears of reprisal [might] deter contributions to the point where the movement cannot survive." 424 U.S. at 70-71. The Court suggested that such a situation would be analogous to two earlier cases, *NAACP v. Alabama*, 357 U.S. 449 (1958), and *Bates v. City of Little Rock*, 361 U.S. 516 (1960), in which the required disclosure of names of rank-and-file members was held invalid as applied to groups that had demonstrated a legitimate fear of reprisals. In such instances, the *Buckley* Court explained, "the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the Act's requirements cannot be constitutionally applied." 424 U.S. at 71. *See Brown v. Socialist Workers*

[11] In the context of lobbying disclosure requirements, the Court has similarly considered the possibility that reporting requirements "may as a practical matter act as a deterrent to [the lobbyist's] exercise of First Amendment rights." *Harriss*, 347 U.S. at 626. The Court went on to find, however, that "[t]he hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest." *Id.*

'74 Campaign Committee, 459 U.S. 87, 98-102 (1982) (applying *Buckley*'s minor party exception).

Given the "sensitive associational rights" that the Court was seeking to protect with the minor party exception, *see Brown*, 459 U.S. at 109 (O'Connor, J., concurring in part and dissenting in part)—rights which are plainly not implicated by source identification requirements such as Ohio's [12]—it is highly questionable whether any analog to that doctrine would apply in this context. Yet even if fear of reprisals might require, in some imaginable case, exemption from Ohio's identification requirement, it is clear from the record that no such fear of reprisals was demonstrated here.[13] McIntyre did not refuse to comply with the statutory identification requirement on the ground that she feared reprisals; on the contrary, she testified to the OEC that she had placed her name and address on some of the flyers and had intended fully to comply with the requirement by placing identifica-

[12] Ohio's law does not infringe on the ability of individuals to join groups or to participate in speech as part of a group. Where a communication is authored by a group, rather than an individual, only the name of an officer of the group need appear on the communication; the disclosure of other group members' identities is not required. *See* Ohio Rev. Code § 3599.09(A). Significantly, the groups objecting to the disclosure of the names of their rank-and-file members in *NAACP* and *Little Rock* voluntarily disclosed the names of their officers. *See NAACP*, 357 U.S. at 464; *Little Rock*, 361 U.S. at 521 n.4. This is likely because officers' involvement in a group is so substantial as to be a matter of public knowledge even in the absence of disclosure. *Cf. Brown*, 459 U.S. at 114-15 (O'Connor, J., concurring in part and dissenting in part) (identification of "persons [who] have already publicly demonstrated their support [for a party's ideology] by their campaign work" unlikely to trigger harassment).

[13] The minor party exception requires the demonstration of a "reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Brown*, 459 U.S. at 93 (quoting *Buckley*, 424 U.S. at 74).

tion on all flyers that were distributed. *See* pp. 3-4, *supra*. Moreover, she openly handed out the flyers herself, and never made any attempt to hide her identity. *See* Pet. Br. 5-6; J.A. 12. Such actions would be inconsistent with any legitimate fear of reprisals; instead, it is more consistent with the explanation McIntyre herself offered—that the failure to provide proper identification was the result of an oversight. *See* J.A. 12, 36-40.

Petitioner's intimation that her prosecution under Ohio's disclosure law constitutes official "retaliation," *see* Pet. Br. 14-15, 41, is groundless. Retaliation, as relevant in the context of disclosure requirements, involves negative consequences stemming from compliance with the requirement in question, where that compliance serves to publicly identify an individual with an unpopular ideology or group. Thus, an individual who is forced to comply with a disclosure statute and who thereby reveals her previously concealed identity as a member of a particular group might suffer retaliation in the form of loss of job, violence, threats, or harassment. *See, e.g., Brown*, 459 U.S. at 113 (O'Connor, J., concurring in part and dissenting in part).

Such instances of retaliation stemming from compliance with a disclosure statute stand in stark contrast to McIntyre's situation, in which an individual has already chosen to identify herself publicly with a position, independent of the disclosure statute's requirements.[14] When such an individual is the subject of an enforcement action for her failure to identify herself in the manner required by the statute, this is not "retaliation" triggered by the compelled disclosure of her identity under the statute; it is nothing

[14] *Cf. Brown*, 459 U.S. at 111-12 (O'Connor, J., concurring in part and dissenting in part) ("Once an individual has openly shown his close ties to the organization by campaigning for it, disclosure of receipt of expenditures is unlikely to increase the degree of harassment so significantly as to deter the individual from campaigning for the party.").

more than the enforcement of the disclosure statute itself.[15]

Similarly unavailing is petitioner's contention that the Ohio statute should be invalidated as a content-based restriction on speech, on the ground that it compels the identification of the source to be printed on the literature itself. *See* Pet. Br. 21. While it is certainly true that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech," *Riley v. National Federation of the Blind*, 487 U.S. 781, 795 (1988); *see* Pet. Br. 21, petitioner cites no case suggesting an identification requirement like Ohio's amounts to unconstitutionally compelled speech. The compelled speech held to be constitutionally impermissible in *Riley* involved the required disclosure of specific, substantive factual data—"the average percentage of gross receipts actually turned over to charities by the fundraiser for all charitable solicitations conducted in North Carolina within the previous 12 months"—prior to beginning solicitation. 487 U.S. at 786. Moreover, the *Riley* Court clarified that "nothing in this opinion should be taken to suggest that the State may not require a fundraiser to disclose unambiguously his or her professional status. On the contrary, such a narrowly tailored requirement would withstand First Amendment scrutiny." *Id.* at 799 n.11. Thus, far from standing for a broad prohibition on any requirement that identifying information be included in a communication, *Riley* suggests that a statute such as Ohio's, which calls only for minimal identifying informa-

[15] No issue of selective enforcement was raised or litigated below, and no evidence supporting such a claim, such as evidence of patterns of enforcement or nonenforcement of § 3599.09(A) against other speakers, was presented or considered below. Speculation entertained by the single dissenting Ohio Supreme Court justice (Pet. App. A-10) and joined in by petitioner (Pet. Br. 14-15) is a patently insufficient basis for this Court to find any impropriety in the enforcement of the statute.

tion necessary to serve important state purposes, would pass constitutional muster.

In sum, the Court has already considered the burdens placed on First Amendment interests by limitations on anonymity and has consistently found them to be insufficient, standing alone, to justify the invalidation of legislation that serves compelling public interests. It has therefore found disclosure requirements to be "a reasonable and minimally restrictive method of furthering First Amendment values by opening the basic processes of our federal election system to public view." *Buckley*, 424 U.S. at 82. The same conclusion is warranted here.

2. *Ohio's Identification Requirement is Narrowly Tailored to Achieve Its Compelling Purposes*

Despite the fact that Ohio's disclosure requirement operates within the limited context of elections and fulfills compelling state objectives, petitioner asserts that it is not narrowly enough tailored to survive First Amendment scrutiny. Petitioner argues both that it is overbroad insofar as it fails to exempt leafletters who have not exceeded an unspecified minimum expenditure, and that it is underinclusive insofar as it makes exceptions for certain types of campaign materials. Both contentions are without merit.

Petitioner asserts that § 3599.09(A) "does not confine itself to those activities that may potentially distort the electoral process[,]" because it does not exempt "the street corner leafletter" who has not made a sufficiently high "minimum expenditure." Pet. Br. 36.[16] The Court in *Buckley* rejected a similar argument that the federal reporting and disclosure requirements applied to amounts

[16] Petitioner does not propose a particular "minimum expenditure" threshold, nor does petitioner reveal how much was spent in printing costs and other incidentals to distribute the flyers at issue here. The record does indicate that at least some of the flyers were prepared by a commercial printer. *See* J.A. 39-40.

"too low even to attract the attention of the candidate, much less have a corrupting influence." 424 U.S. at 82. While acknowledging that "[t]he $10 and $100 thresholds" set by the federal statute "are indeed low" and observing that they "m[ight] well discourage participation by some citizens in the political process," the Court deferred to Congress's judgment in choosing the thresholds:

> [W]e cannot require Congress to establish that it has chosen the highest reasonable threshold. The line is necessarily a judgmental decision, best left in the context of this complex legislation to congressional discretion. We cannot say, on this bare record, that the limits designated are wholly without rationality.

424 U.S. at 83.

Here, Ohio has made a legislative judgment that its compelling interests are best served by requiring the identification of the source of campaign communications without regard to the amount of the expenditure involved.[17] There has been no demonstration that this legislative choice was unreasonable, especially given the fact that, as the Court noted in *Buckley*, "virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs." 424 U.S. at 19. Also significant is the fact that, as the Court recognized in *Buckley*, "disclosure serves informational functions, as well as the prevention of corruption," *id.* at 83; the former interest is advanced by disclosure of the source of even inexpensive communications. And, as the Court explained in *Buckley*, a legislature "is not required to set a threshold that is tailored only to [particular] goals." *Id.*

[17] Ohio's statute is far from unique in applying identification requirements to "the street corner leafletter." Disclosure statutes enacted in most other States likewise encompass such materials as pamphlets, handbills, and circulars. *See* Br. *Am. Cur.* State of Tennessee at App. A-1 - A-2.

Furthermore, it appears a monetary threshold would be quite problematic in the context of a source identification statute such as Ohio's. This case illustrates the problem: each flyer that McIntyre handed out might be nominal in cost on its own, but if she distributed hundreds or thousands of flyers, the aggregate cost could become very substantial. In addition, the total aggregate cost might not at first be apparent if additional sets of flyers were printed on an as-needed basis, as McIntyre has indicated was the case here. *See* J.A. 37. The same problems would be presented in the case of other "high volume" campaigning techniques, such as direct mail. Excluding all materials with a low individual cost from the source disclosure requirement, regardless of how high the aggregate cost for those materials might be, would clearly fail to fulfill the State's compelling interests. On the other hand, making all materials subject to the requirement after an aggregate expenditure threshold has been reached by the speaker would be easily circumvented and virtually impossible to enforce. *Cf. Buckley*, 424 U.S. at 84 (finding low thresholds justified, in part because they would make circumvention through aggregation of smaller contributions more difficult).

Petitioner also takes issue with the fact that § 3599.09 allows for regulatory exceptions for campaign materials (such as pencils, buttons, and balloons) where compliance with the identification requirement would be impracticable. *See* Pet. Br. 37. But States may properly enact laws which only "address the problems that confront them;" moreover, "[t]he First Amendment does not require States to regulate for problems that do not exist." *Burson v. Freeman*, 112 S. Ct. at 1856 (plurality opinion). Petitioner offers no evidence suggesting that Ohio acted unreasonably in determining that certain types of campaign materials, for which disclosure would be impracticable, could be exempted without threatening the compelling

interests which the disclosure requirement serves.[18] Instead, the regulatory exclusions, like the decision not to include a minimum expenditure threshold, represent a legislative judgment that is fully consistent with the compelling goals that Ohio's narrowly tailored statute seeks to achieve.

II. INVALIDATION OF OHIO'S SOURCE IDENTIFICATION REQUIREMENT COULD CALL INTO QUESTION A BROAD RANGE OF STATE AND FEDERAL CAMPAIGN DISCLOSURE MEASURES WHICH ARE ESSENTIAL TO THE INTEGRITY OF THE ELECTION PROCESS

Disclosure and reporting requirements have long been essential to election regulation at both the federal and state levels.[19] They remain "the cornerstone of reform." Herbert E. Alexander, *Financing Politics: Money, Elections, and Political Reform* 164 (4th ed. 1992). Almost all States have identification requirements that are very similar to Ohio's. *See* Br. *Am. Cur.* State of Tennessee at 1, App. A-1 - A-2. A closely analogous statute also exists at the federal level. *See* 2 U.S.C. § 441d.[20]

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[18] A similar judgment was apparently made at the federal level. *See* 11 C.F.R. 110.11(a)(2) (exempting "bumper stickers, pins, buttons, pens and similar small items upon which the disclaimer cannot be conveniently printed" from the requirements of 2 U.S.C. § 441d).

[19] *See* Christopher Cherry, *State Campaign Finance Laws: The Necessity and Efficacy of Reform*, 3 J. Law & Politics 567, 594 (1987) ("Since the last decade of the nineteenth century, contribution limits and reporting requirements have emerged as the predominant campaign finance regulation tools."); *see generally United States v. International Union United Automobile Workers*, 352 U.S. 567, 570-83 (1957) (discussing history of campaign regulation).

[20] Section 441d requires those who engage in communications advocating particular candidates for election to indicate whether the communication is funded or authorized by the candidate, the candidate's authorized political committee, or its agents. If the communication is not funded by the candidate, the communication

All fifty States have some form of disclosure or reporting requirements. *See, e.g.*, Alexander, *Financing Politics* at 127-29 (Table 7-1); *see generally*, Federal Election Commission, *Campaign Finance Law 92* (1992) (discussing statutory requirements in each State). In addition to the informational and anti-fraud functions served by these statutes, in States with campaign contribution limits they also "constitute the primary method of monitoring compliance with the limits." Cherry, *State Campaign Finance*, 3 J. Law & Politics at 578. Likewise, a majority of States forbid anonymous contributions. *See* Frank J. Sorauf, *Money in American Elections* 287 (1988) ("36 [States] have absolute prohibitions against anonymous donations; three more prohibit them above a stated sum"). Such prohibitions on anonymous contributions often close a major enforcement loophole in States that have contribution limits: "[i]n states which do not regulate anonymous or misattributed donations, a donor may easily circumvent contribution limits." Cherry, *State Campaign Finance*, 3 J. Law & Politics at 575.

Because disclosure represents a minimally intrusive mechanism for combatting many of the evils that can distort, undermine, and corrode elections, it has been recognized as central to our democratic system. "If several basic truths must be considered in designing a system of political finance regulation, at least one basic policy should be universal: comprehensive and timely disclosure.

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must identify the persons who paid for the communication. 2 U.S.C. § 441d.

While Section 441d is the most directly analogous federal disclosure statute, a number of other federal disclosure and reporting provisions are directed at the same basic goals—fostering an informed electorate, preventing fraud and corruption, and facilitating the enforcement of other campaign finance laws, such as contribution limits. *E.g.*, 2 U.S.C. § 434 (prescribing reporting requirements for political committees which include, *inter alia*, the identification of persons and political committees making contributions or other transfers). *Buckley*, 424 U.S. at 66-68, 80-82.

Both liberals and conservatives have deemed disclosure fundamental to the political system." Alexander, *Financing Politics* at 164.

If the First Amendment were found to prohibit Ohio's source identification requirement, a garden-variety campaign disclosure requirement, other longstanding campaign finance regulations involving disclosure could also be called into question. *See* Cherry, *State Campaign Finance*, 3 J. Law & Politics at 583-84. The Court should be reluctant to make such inroads on this vital, well-established body of campaign disclosure law.

CONCLUSION

The judgment of the Supreme Court of Ohio should be affirmed.

Respectfully submitted,

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July 1, 1994

No. 93-986

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

MARGARET MCINTYRE,
Petitioner,

v.

OHIO ELECTIONS COMMISSION,
Respondent.

On Writ of Certiorari to the Supreme Court of Ohio

BRIEF OF THE CALIFORNIA POLITICAL ATTORNEYS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

The California Political Attorneys Association (CPAA), a bipartisan association of nearly one hundred California attorneys who practice campaign, elections, and poltical law, files this brief *amicus curiae* with the consent of the parties as provided for in the Rules of this Court.

CPAA's membership represents and advises hundreds of clients—Republicans, Democrats, and independents; incumbents and challengers; ballot measure committees which support or oppose initiatives and referenda at the state and local levels; political action committees of associations, corporations, and labor organizations; individual and business entity donors; and grass roots organizations of all stripes. Most of these individuals and

organizations must comply with—and often rely upon CPAA members to advise them with respect to compliance with—California's speaker identification requirements for political mass mailings.

Individual CPAA members have represented clients in numerous enforcement proceedings of the California state agency which is responsible for interpretation and enforcement of these compelled speech requirements. The CPAA itself has appeared as an *amicus curiae* in a case pending before the California Supreme Court, challenging the constitutionality of the California requirements. The CPAA also has filed briefs *amicus curiae* in several other California appellate court proceedings to provide the courts with the insight of those who have defended persons in enforcement proceedings involving political regulations.

While speaker identification requirements provide a substantial source of business for political attorneys, CPAA files this brief because the extensive experience of its members with enforcement of the California requirements has shown the requirements to have an unduly burdensome effect on political expression, especially political expression of those least sophisticated in exercising their First Amendment rights.

SUMMARY OF ARGUMENT

California's identification requirement for political speakers shows how complex and burdensome such requirements can become. The statute and its implementing regulations are so difficult to understand that those subject to their requirements act at their peril if they seek to exercise their First Amendment right of expression without first retaining specialized legal counsel. In numerous administrative enforcement actions under the California statute, unsophisticated participants in electoral campaigns have been penalized heavily for inadvertent violations in which anonymity was not even an

issue. More sophisticated candidates and campaign committees have also been penalized under circumstances where the public was fully informed of the identity of those involved.

The experience with the California statute only underscores the constitutional infirmity of prohibitions on anonymity in political speech. As this Court held in *Talley v. State of California*, 362 U.S. 60 (1960), anonymous literature has long played an important role as a vehicle for the expression of political views that would otherwise never be expressed. Speaker identification requirements are also constitutionally infirm because they are a form of compelled speech that impermissibly burdens a private speaker's message, a point that has not been addressed by the parties.

Because speaker identification requirements directly and substantially burden speech protected by the First Amendment, strict scrutiny is required. Ohio Revised Code § 3599.09 fails both prongs of the strict scrutiny test. First, Ohio has advanced no state interest sufficiently compelling to justify its identification requirements for political speakers. Second, the statute is not narrowly tailored to apply only to speech that may properly be regulated.

ARGUMENT

This Court should hold the Ohio statute unconstitutional on its face because it, and speaker identificaiton statutes similar to it in California and other states, impermissibly infringe on rights protected by the First Amendment by prohibiting anonymity in political speech. The prohibition of anonymity does not in fact serve any public interest sufficiently compelling to justify the infringement on the First Amendment, and is not narrowly tailored to serve any interest that has been advanced to justify compelled disclosure.

Experience with the similar California statute compelling speaker identification provides numerous examples

of the pitfalls in attempts to regulate political speech by compelling identification of those responsible for it. This brief will first discuss the experience of Amicus California Political Attorneys Association (CPAA) with the California statute, because that experience is instructive on the difficulties of regulating political speech, and is a perspective that this Amicus is in a unique position to share with this Court. This brief will then support several aspects of the points made by Petitioner in this case, and by the dissent in the court below, and add additional considerations.

PART 1.

THE CALIFORNIA EXPERIENCE WITH COMPELLED SPEAKER IDENTIFICATION.

1.1 California's statute illustrates the complexity to which political speaker identification mandates are prone and the resulting burden on speech.

California's compelled speaker identification statute is instructive in the present case because it is an example of the extreme complexity to which rules mandating identification of political speakers are prone.

The statute, § 84305 of the California Government Code, is part of California's Political Reform Act, adopted by the state's voters as an initiative measure in 1974.[1] In its original form, § 84305 established a relatively simple requirement that political mass mailings

[1] The Political Reform Act of 1974, as amended, is found in California Government Code, Title 9, Chapters 1 through 11, §§ 81000-91015, inclusive. The Act is a comprehensive regulatory scheme which, among other things, requires reporting of campaign contributions and expenditures in a manner similar to that of the Federal Election Campaign Act, regulates conflicts of interest by public officials, regulates lobbying, provides auditing and enforcement procedures, and creates the Fair Political Practices Commission to interpret and enforce the provisions of the Act. All statutory references are to the California Government Code unless otherwise noted.

bear a postal bulk permit number that could be traced, or, at the option of the sender, the sender's name and address. This relatively simple requirement provided an audit trail for campaign finance audits. A series of statutory amendments and interpretative regulations, however, soon followed. The key amendment transformed the voluntary option of sender identification into a requirement, and a long slide down a slippery slope of increasingly complex regulation began. Each amendment and interpretive regulation that followed has made the rules governing how senders must be identified more complex, more confusing, and more intrusive. The trend toward ever more bewildering complexity shows no signs of abating, with further amendments being urged on the state legislature and the state Fair Political Practices Commission in every election cycle.

In its current form, § 84305 provides as follows:

> (a) Except as provided in subdivision (b), no candidate or committee shall send a mass mailing unless the name, street address, and city of the candidate or committee are shown on the outside of each piece of mail in the mass mailing and on at least one of the inserts included within each piece of mail of the mailing in no less than 6-point type which shall be in a color or print which contrasts with the background so as to be easily legible. A post office box may be stated in lieu of a street address if the organization's address is a matter of public record with the Secretary of State.
>
> (b) If the sender of the mass mailing is a single candidate or committee, the name, street address, and city of the candidate or committee need only be shown on the outside of each piece of mail.
>
> (c) If the sender of a mass mailing is a controlled committee, the name of the person controlling the committee shall be included in addition to the information required by subdivision (a). [West's Annotated Codes]

While § 84305 is complicated even when read alone, the complication and confusion is multiplied when the numerous statutes and regulations defining its terms are considered, as they must be by those subject to its mandate. The result is a daunting obstacle to individuals and organizations that want to express their views on an election issue, by means of even a relatively small mailing to other voters. Before expressing their views, those persons must make their way through a maze of confusing, multi-pronged, cross-referenced definitions and requirements in numerous statutes and regulations.[2] Those who fail are subject to penalties of $2,000 per violation in administrative enforcement actions brought by the Fair Political Practices Commission (§§ 83115-83116.5) or, for wilful violations, to misdemeanor conviction with a maximum fine of $10,000 (§ 91000) and up to six months of incarceration (Calif. Penal Code § 19). The $100 penalty imposed on Ms. McIntyre for violation of the Ohio statute appears mild by comparison.

Persons covered by § 84305 are any "candidate" or "committee."[3] The definition of "candidate" in § 82007 includes, as one would expect, any individual qualified for the ballot, but also includes any individual who has

[2] Regulations promulgated by the Fair Political Practices Commission under the authority of § 83112 of the California Government Code are found in California Code of Regulations, Title 2, Division 6, §§ 18109-18954, inclusive, and are cited herein as "FPPC Regulation § ———."

[3] Section 84305 at one time simply applied to any "person," like the Ohio statute, reading "No person shall make an expenditure for the purpose of sending a mass mailing unless . . . ." (§ 84305 as amended by Calif. Statutes 1978, Chapter 1408.) This broad application was narrowed to "candidate" and "committee" in 1984 (Calif. Statutes 1984, Chapter 1368) in response to the decision in *Schuster v. Municipal Court*, 109 Cal.App.3d 887 (1980), in which the court invalidated a similar speaker identification requirement in California Elections Code § 29410 on the grounds that it was an overly-broad infringement on the right of anonymity protected by the First Amendment. That statute, like Ohio's, applied to every "person" and to all forms of printed material concerning an election.

received any "contribution" or made any "expenditure" with a view to eventual nomination or election to any state or local office, whether or not the individual has decided on a particular office. "Committee" as defined in § 82013 means "any person or combination of persons" that receives or makes contributions or expenditures over specified threshold amounts. Thus, not only the typical campaign committee organized to support a candidate or ballot measure is subject to the identification requirement. Under the broad definition of "committee," an informal group of citizens, or even a lone individual who makes independent expenditures expressly advocating for or against a candidate or ballot measure, also qualifies as a "committee" and is subject to the speaker identification requirement. There is no warning in § 84305 itself, however, that its provisions apply to individuals.

The next question for these would-be speakers is whether the requirement applies to their chosen means of communication. The term "mass mailing" is defined in § 82041.5 as "over two hundred substantially similar pieces of mail . . . ," but is limited by FPPC Regulation § 18435 to instances when such mail is sent within a calendar month.

When the speaker determines that the proposed speech will be subject to the requirements of § 84305, the next questions concern the technical requirements of compliance. Some of these, although detailed, are apparent on the face of § 84305, which requires the speaker identification to show: (i) name, street address, and city; (ii) although a post office box may be used if the organization's address is a public record with the Secretary of State; (iii) on the outside of each mail piece; (iv) and on at least one insert unless the sender is only a single candidate or committee in which case identification is required only on the outside of each mail piece; (v) in no less than 6-point type; and (vi) in a color or print which contrasts with the background so as to be easily legible.

The technical requirements of compliance, however, also include determining and using the appropriate name for the sender, a determination that can be quite difficult. One technical requirement concerning the manner in which the sender must be identified is apparent from the face of § 84305: "(c) If the sender . . . is a controlled committee, the name of the person controlling the committee shall be included . . . ." The term "controlled committee" is defined in § 82016 as "a committee which is controlled directly or indirectly by a candidate [defined in § 82007, see discussion above] or state measure [defined in § 82051] proponent [defined in § 82047.6 by reference to the definition in California Elections Code § 3502] or which acts jointly [formerly defined in FPPC Regulation § 18585, repealed in 1976, Register 76, No. 16] with a candidate, controlled committee or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he, his agent or any other committee he controls has a significant influence on the actions or decisions of the committee."

Including the name of the controlling candidate or proponent in the identification is only a start, however, toward full compliance. First, if a committee's principal activity is the support of or opposition to a ballot measure, § 84107 requires that reference to support or opposition to the ballot measure number be included "in any reference to the committee required by law."

Second, if the sending committee qualifies as a "sponsored committee," the sponsor's name must be included in the identification on the mailing. There is no reference to this special identification requirement for "sponsored" committees in § 84305. It is only by reading several other provisions together that the requirement is revealed. Section 84102 provides, in relevant part, that "[i]n the case of a sponsored committee, the name of the committee shall include the name of its sponsor." The requirement for identification of the sponsor is made applicable to mass mailings by virtue of § 84106, which provides:

"(a) Whenever identification of a sponsored committee is required by this title, the identification shall include the full name of the committee . . . ." Under § 82048.7, a committee is deemed to be "sponsored" by any "person" that collects contributions for the committee through payroll deductions or dues from its members, officers, or employees, provides administrative services to the committee, participates in setting fundraising and spending policies for the committee, or contributes 80% or more of the committee's funds. § 82048.7. Finally, FPPC Regulation § 18435 defines "sender" as "the candidate or committee who pays for the largest portion of expenditures attributable to the designing, printing, and posting of the mailing . . . ."

Only after working through all of these definitions can a speaker subject to the identification requirement determine what form the required identification must take.[4]

1.2 Repeated experience with enforcement of California's speaker identification statute reveals its chilling impact on political speech.

Amicus CPAA's members have extensive experience in representing persons who are prosecuted by California's Fair Political Practices Commission (the "FPPC") for violations of § 84305's speaker identification requirements, under the administrative enforcement provisions of California's Political Reform Act.[5] Examples of the reported

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[4] Ohio Revised Code § 3599.09, by contrast, is vague and uncertain due to its use of extremely general terminology. Its requirement, for instance, that identification appear "in a conspicuous place" is simple; but it is also vulnerable to subjective interpretation in enforcement. The Ohio statute exempts "personal correspondence" in general language that also is vulnerable to subjective interpretation; the California statute has a more precise numerical threshold, requiring identification on a "mass mailing," defined as over 200 "substantially similar" pieces of mail.

[5] The FPPC is authorized to prosecute violations of the Political Reform Act by §§ 83115 through 83116.5 of the Government Code. Violations are punishable by monetary penalties of up to $2,000.

enforcement actions demonstrate how the speaker identification provisions are a trap for the unwary, and even for the wary, and create an expensive and chilling burden on political speech.

A. Speaker identification requirements penalize those least sophisticated in the political process and most in need of the protections of the First Amendment.

Ms. McIntyre is an example of an individual citizen, exercising her First Amendment rights, who was not seeking to preserve her anonymity but was nonetheless punished for an apparently inadvertent violation of a speaker identification requirement. Ms. McIntyre's case, unfortunately, is not anomalous.

FPPC enforcement decisions repeatedly demonstrate how the speaker identification requirement in California has been a trap for the unwary—unsophisticated individuals or groups of citizens who think that the Constitution protects their right to voice their opinions to their fellow citizens in an election campaign, but find out too late that they have violated a law in speaking out.

1. Riverside Tomorrow Citizens' Group Enforcement Case.

In this enforcement action, the FPPC imposed a $4,000 fine on a local, grass-roots group of voters, whose members were unaware of the fine points of campaign mailing identification. *In the Matter of Riverside Tomorrow—Riverside Landowners & Arlington Heights Landowners*

The FPPC assesses such penalties on a per-violation basis, without regard to fault. § 83116(c). The FPPC's administrative enforcement decisions are published by California Continuing Education of the Bar, cited in this brief as [year] CEB FPPC Enforcement Decisions [page]. Because the FPPC enforcement decisions are not readily available in law libraries, we have lodged with the Court and served on the parties copies of the decisions that are cited in this brief.

Association Committee (FPPC No. 88/239, 1990-1992 CEB FPPC Enforcement Decisions 731). Their committee had sent two mass mailings which failed to include the name of the committee's sponsor in the name of the committee. The first mailing urged a "no" vote on a local ballot measure, and contained the sender identification "Riverside Tomorrow—A Citizens' Lobby" together with the sender's address. However, that identification lacked the name of the *sponsoring* organization, the Arlington Heights Landowners Association.

The second mailing bore the same sender name and address. However, this mailing also contained a cover letter with the name and logo of the "Arlington Heights Citizens Association." The FPPC's enforcement decision, while noting that "the committee did not have any prior experience with campaign committees or reporting requirements, listed as "factors in aggravation":

> . . . the mailers' identification deprived the public of knowledge of [Arlington Heights Landowners Association]'s involvement in the mailers. This information would have allowed the voters to better evaluate the mailers' contents. . . . Furthermore, the Measure E mailing was identified on the inside as being from the Arlington Heights *Citizens* Association rather that [sic] the Arlington Heights *Landowners* Association.

Id., 1990-1992 CEB FPPC Enforcement Decisions at 737.

2. California Judges Association Enforcement Case.

In this case, the FPPC imposed a $2,000 fine on the California Judges Association's Committee for Public Responsibility ("CJA-CPR"), formed to oppose a statewide ballot measure which would have capped state judges' salaries. *In the Matter of California Judges Association—Committee for Public Responsibility* (FPPC No. 89/186, 1990-1992 CEB FPPC Enforcement Decisions 27). Once again, anonymity was not the issue. The judges were

fined because, while postcards paid for by the committee and mailed by individual judges referred to both the judges' association and the individual judge, the identification was not in the precise form required by the statute.

The committee designed and produced 180,000 "Dear Friend" postcards urging recipients to join with several organizations, including the California Judges Association, in opposing the ballot measure. Individual judges signed and sent the postcards to voters in their jurisdictions. The committee paid most of the postage costs.

The FPPC found that the California Judges Association violated the law because:

> Neither the front or the back of the postcard contained the name, street address and city of the CJA-CPR committee, which qualified as the "sender" of the mass mailing pursuant to Regulation 18435.

The FPPC noted as a "Factor in Aggravation" that "recipients of the 'Dear Friend' postcards were not aware that CJA-CPR was the true sender of the mailing rather than the individual judge who signed the postcard." The committee of judges was fined, notwithstanding the FPPC's finding in mitigation that:

> The CJR-CPR members responsible for designing and reviewing the postcard were relatively inexperienced in political campaigns and were not aware of the sender identification requirement for mass mailings. The committee believed that since the postcards were sent by individual judges that they did not require committee identification. . . .

Id. at 32.

3. *Alliance for Mission Viejo Enforcement Case.*

In this case, the FPPC fined another local, grass-roots citizens committee $2,000. *In the Matter of Alliance for Mission Viejo—Yes on Measure A, Yes on Recall* (FPPC No. 90/163, 1990-1992 CEB FPPC Enforcement Decisions 183). A citizens group paid for and sent a mass mailing containing a political statement by a well-known local figure, Orange County Supervisor Tom Riley, regarding *his* position on the impact of a local ballot measure, a position with which the citizens group agreed. The mailing used Riley's letterhead with his name and address. The name and address of the citizens group did not appear on the mailing. When the committee learned that the statute required its name and address to appear on the mailing, it promptly reported its omission to the FPPC. Although the violation was inadvertent and voluntarily reported, the FPPC imposed the maximum administrative fine of $2,000.

B. Speaker identification requirements become a trap even for the wary, because of the complex web of requirements woven to compel disclosure of the "real" sender in the eyes of the statutory scheme.

The FPPC's enforcement decisions also illustrate how a complex statutory scheme for compelled speaker identification becomes a trap even for relatively sophisticated participants in the political process, burdening—and punishing—their speech.

1. *Barbara Riordan Enforcement Case.*

In this enforcement case, the FPPC imposed a $1,000 fine on a county supervisor who mailed to voters a tabloid-style campaign mailing that identified a different "sender" than the statute required, but otherwise complied with the location, size, and legibility requirements of the statute. *In the Matter of Barbara Riordan and "Barbara Riordan for Supervisor Committee"* (FPPC No. 88/583, 1987-1989 CEB FPPC Enforcement Decisions 881). The mailing identified the sender as "Yucaipa Citizens for Supervisor Riordan Re-election." The FPPC found that Yucaipa supporters of the Supervisor did in fact conceive, design and print the newsletter. However, it imposed a fine because, under § 84305 and FPPC Regula-

tion § 18435, "Barbara Riordan for Supervisor Committee," the committee that paid for the mailing, should have been identified.

2. *Trice Harvey Enforcement Case.*

In *In the Matter of Assemblyman Trice Harvey, Committee to Elect Trice Harvey, and Mark Abernathy* (FPPC No. FC-86/512, 1987-1989 CEB FPPC Enforcement Decisions 123), the FPPC imposed a fine of $1,000 upon the respondents for sending a fundraising letter which did not comply with the California speaker identification requirements. The mass mailing was a fundraising letter sent by Assemblyman Harvey's committee. The format of the solicitation was a letter from then-California Governor George Deukmejian, endorsing Assemblyman Harvey. Harvey was clearly identified as the endorsee, and the mailing contained solicitation materials directing contributors to make checks payable to Harvey's committee and to return the checks in a "business return envelope" addressed to Harvey's committee. However, the mailing did not comply with the requirements of California law because it did not include Harvey's full committee name and address on the *outside* envelope.

The result of California's complex statutory scheme and the FPPC's policy of zealous, hyper-technical, absolute-liability enforcement is to require any citizen who wants to be heard in state or local political campaigns in California either to become thoroughly familiar with a set of statutes and regulations that is difficult even for experienced attorneys to master, or to engage legal counsel to advise on compliance. Hiring an attorney, however, should not be a condition of safely exercising one's First Amendment right to unfettered political expression.

1.3 California state court decisions have cast doubt on the constitutionality of § 84305.

In *Schuster v. Municipal Court*, 109 Cal.App.3d 887 (1980) the California Court of Appeal invalidated a compelled speaker identification provision formerly found in California Elections Code § 29410, which was very similar to the Ohio statute challenged in this case. The statute provided, in relevant part: "Every person . . . is guilty of a misdemeanor who causes to be reproduced . . . any . . . matter having reference to an election . . . unless there appears . . . the name and address of the business or residence of a person responsible for it." The court found that this speaker identification requirement was an overly-broad infringement on the right of anonymity protected by the First Amendment. *Schuster*, 109 Cal.App.3d at 899. The California Supreme Court denied review, and this Court denied a petition for a writ of certiorari. *Id.*, 109 Cal.App.3d at 899, *cert. denied*, 450 U.S. 1042 (1981).

California's current speaker identification requirement, California Government Code § 84305, was amended and re-worded in part to cure the defects that the *Schuster* court found in former California Elections Code § 29410. However, even as amended, the speaker identification requirements in § 84305 are not distinguishable from those of former Elections Code § 29410 for purposes of First Amendment analysis, and are invalid for the same reasons that the *Schuster* court invalidated former California Elections Code § 29410.

The constitutionality of § 84305 itself is now before the California Supreme Court for review, in *Griset, et al. v. Fair Political Practices Commission*, California Supreme Court No. G011724. The court accepted review on petitions by both parties from a decision of the state Court of Appeal, which had upheld the validity of § 84305 as applied to candidates and candidate-controlled committees, but invalidated the statute on First Amend-

ment grounds as applied to any other person who would fall within its scope—including committees supporting or opposing ballot measures and persons or committees making independent expenditures concerning candidates or ballot measures. *See Griset, et al. v. Fair Political Practices Commission*, 20 Cal.App.4th 1114, 1118-22 (1992) (reprinted to permit tracking pending review).

Briefing in the California Supreme Court has been completed, but the court has not yet announced a date for oral argument.

PART 2.

OHIO'S REQUIREMENT FOR SPEAKER IDENTIFICATION IN POLITICAL SPEECH IS UNCONSTITUTIONAL ON ITS FACE.

2.1 Prohibiting anonymity in political speech infringes on the First Amendment.

Amicus CPAA agrees with Petitioner's argument that Ohio's speaker identification requirement constitutes a flat ban on anonymity in printed political speech, and that such a ban is prohibited by the First Amendment and by this Court's decision in *Talley v. State of California, supra*, 362 U.S. 60 and cases cited in *Talley*.

The First Amendment right of anonymity recognized in *Talley* applies with at least equal vigor to political speech of the type regulated by the Ohio and California statutes. This Court has repeatedly emphasized, in a variety of factual contexts, that political speech is at the core of the values protected by the First Amendment: "[T]he constitutional guarantee [of the First Amendment] has its fullest and most urgent application precisely to the conduct of campaigns for political office," *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971); "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms

of government, the manner in which government is operated or should be operated, and all such matters relating to political processes," *Mills v. State of Alabama*, 384 U.S. 214, 218-219 (1966); and "[t]he political candidate does not lose the protection of the First Amendment when he declares himself for public office. Quite to the contrary . . . . ," *Brown v. Hartlage*, 456 U.S. 45, 53 (1982).

2.2 Speaker identification requirements also infringe on the First Amendment by compelling speech that impermissibly burdens the speaker's message.

There is another aspect of speaker identification requirements that was not discussed in the Ohio Supreme Court's decision below or in the petition for certiorari. Unlike campaign finance reporting requirements, Ohio Revised Code § 3599.09, and to an even greater extent its California counterpart, California Government Code § 84305, affirmatively compel all covered speakers to disclose the speaker's identity and often the speaker's affiliations, all as part of the communication itself. The statements they require are thus content-based, compelled speech.

Ohio Revised Code § 3599.09 compels all persons and organizations that wish to engage in written political expression, other than in personal correspondence, to disclose their identity as part of the communication itself.[6] The effect of this requirement is to "burden[] a speaker with unwanted speech" during the course of the speak-

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[6] Ohio Revised Code § 3599.09 requires written identification on the political communications of "the chairman, treasurer, or secretary of the organization issuing" or "the person which issues, makes, or is responsible" for the communication. Similarly, California Government Code § 84305 compels candidates and committees that send as few as 201 substantially similar pieces of mail to identify themselves on the mailing, and where applicable, list the names of persons "controlling" or "sponsoring" them. See section 1.1 of this brief.

er's own message. *See Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781, 800 (1988). Because it "[m]andat[es] speech that a speaker would not otherwise make," Ohio Revised Code § 3599.09 is a content-based regulation of speech, "subject to exacting First Amendment scrutiny." *Id.* at 795, 798; *see First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978).

In *Riley v. National Federation of the Blind of N.C.*, this Court struck down a North Carolina statute that required professional fundraisers for charitable organizations to tell potential donors the percentage of contributions collected during the previous twelve months that had actually gone to charity. Observing "the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored," the Court held that the statute was a content-based regulation of speech, and could not withstand "exacting First Amendment scrutiny." *Id.* at 798, 800.

A statute compelling speech fails the narrow tailoring requirement when government has the option of itself publishing information obtained from mandatory disclosure forms but elects instead to compel a private speaker to include the information in the speaker's own message. *Riley v. National Federation of the Blind of N.C.*, 487 U.S. at 800; *cf. Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981). In *Riley*, the Court found that the speech compelled by the North Carolina statute was unduly burdensome and not narrowly tailored to achieve the state's goal of dispelling public "misperception that the money they give to professional fundraisers goes in greater-than-actual proportion to benefit charity." *Riley*, 487 U.S. at 799. The requirement was unduly burdensome because it would "hamper the legitimate efforts of professional fundraisers" to raise funds for charities:

> [I]n the context of a verbal solicitation, if the potential donor is unhappy with the disclosed percentage, the fundraiser will not likely be given a chance to explain the figure; the disclosure will be the last words spoken as the donor closes the door or hangs up the phone.

Id. at 799-800, footnote omitted.[7]

The statute failed the narrow tailoring requirement because other provisions of the North Carolina law required professional fundraisers to file financial disclosure forms that detailed the share of funds allocated to overhead as opposed to charity. Publication *by the state* of that detailed information would serve the same public information, anti-deception purpose "without burdening a speaker with unwanted speech during the course of a solicitation." *Riley*, 487 U.S. at 800. As the Court explained,

> [t]hese more narrowly tailored rules are in keeping with the First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored. *E.g., Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530, 537-538 [] (1980). "Broad prophylactic rules in the area of free expression are suspect. Precision of regulation

[7] The *Riley* majority offered two similar "unfavorable disclosures" to illustrate how compelled statements of "fact" could burden and detract from a speaker's message. Both examples show that the constitutional prohibition on compelled speech applies to political speakers:

> [W]e would not immunize a law requiring a speaker favoring a particular government project to state at the outset of every address the average cost overruns in similar projects, or a law requiring a speaker favoring an incumbent candidate to state during every solicitation that candidate's recent travel budget. Although the foregoing factual information might be relevant to the listener, and, in the latter case, could encourage or discourage the listener from making a political donation, a law compelling its disclosure would clearly and substantially burden the protected speech.

487 U.S. at 797-98, 799.

must be the touchstone in an area so closely touching our most precious freedoms." *NAACP v. Button,* 371 U.S. 415, 438 [] (1963) (citations omitted).

Riley, 487 U.S. at 800-801.

Ohio Revised Code § 3599.09, by its terms, prohibits virtually all anonymous written political speech. As this Court has long recognized, much political speech would never be uttered without the protective shield of anonymity. "Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all." *Talley v. State of California,* 362 U.S. at 64. And, romantic notions of the lone orator on a soapbox notwithstanding, laws prohibiting anonymity pose the greatest threat to the speech and associational rights of groups and sects. In states other than Ohio, the threat posed to such group rights by political speaker identification requirements, and the content-based nature of such requirements, are even more readily apparent.

For example, California requires, in the guise of a speaker identification requirement, disclosure of the speaker's affiliations. As discussed above, § 84305 of the California Government Code requires that the name of a "committee" that sends more than 200 pieces of political mail be printed on the outside of the mailing. California laws also requires a committee to include in its name the name of an individual or entity by which the committee is deemed to be "sponsored" or "controlled." As a result, political speakers are compelled to identify on their mailings not only themselves but also those with whom they are associated, and often in a manner that conveys a misleading and politically detrimental impression of the prominence of the role played in the committee by the "sponsor" or "controlling" individual.[8] The result goes beyond mere

[8] For example, the FPPC, interpreting the "sponsored committee" and "controlled committee" provisions, directed a committee formed to oppose a local ballot measure to identify itself as a committee "controlled" by an elected county supervisor and not as a "sponsored committee," notwithstanding the fact that the county supervisor was one of sixteen members of the committee's steering committee, thirteen of the other members served in a representative capacity on behalf of the American Lung Association, the American Heart Association, the American Cancer Society, and a variety of other nonprofit organizations, and the nonprofit organizations were significant contributors to the committee. *See Olson* Advice Letter, Calif. FPPC No. A-89-304 (June 19, 1989). A copy of this Advice Letter has been lodged with the Court and served on the parties.

identification to burden the speaker's message with what may be an unwanted message about the speaker's affiliations.[9]

Ohio Revised Code § 3599.09 is not narrowly tailored because Ohio can and does require those who make expenditures for campaign speech to file detailed campaign finance disclosure forms.[10] The information provided on

[9] In dicta, the *Riley* majority referred to a requirement of the North Carolina statute, not challenged in the case, that a professional fundraiser announce the name and address of his or her employer. *Id.*, at 799 n.11. The majority construed this provision as serving to "require[] professional fundraisers to disclose their professional status to potential donors, thereby giving notice that at least a portion of the money contributed will be retained." *Id.* at 799, n.11. The majority opined that a requirement that a fundraiser "disclose unambiguously his or her professional status" would withstand constitutional scrutiny. *Id.* 799, n.11; *but see id.* at 803-04 (Scalia, J., concurring in part and concurring in the judgment) ("Where core First Amendment speech is at issue, the State can assess liability for specific instances of deliberate deception, but it cannot impose a prophylactic rule requiring disclosure even where misleading statements are not made."). At most, the dictum in the majority opinion suggests only that senders of political mass mailings might constitutionally be required to include a notice that the mailing was sent by a "candidate" or "committee," a requirement that would not remove the protective shield of anonymity or reveal the sender's affiliations.

[10] Ohio requires campaign committees, political action committees, and political party committees that make expenditures of any amount in connection with the nomination or election of candidates

those forms should be sufficient to enable the State to achieve the statute's purported purpose of identifying persons who distribute false or fraudulent statements. Each expenditure, no matter how small, must be identified by month, day and year, the name and address of the person paid, the object or purpose for which the expenditure was made, and the amount of the expenditure. Ohio Revised Code § 3517.10(B). For every expenditure over $25, a receipted bill (including a canceled check), stating the purpose of the expenditure, must be filed with the statement of expenditures. Ohio Revised Code §§ 3517.10 (B)(4)-(B)(5). The detailed information in the campaign finance reports is also more than sufficient for the other purpose the Ohio Supreme Court found to be served by Ohio Revised Code § 3599.09: giving Ohio's voters "a mechanism by which they may better evaluate [the] validity" of a political message. See *McIntyre*, 618 N.E. 2d at 155-56. As in *Riley* and *Citizens Against Rent Control v. City of Berkeley*, Ohio could, if it chose, pub-

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to office or in connection with ballot issues in the state to file post-election campaign finance statements, and requires those who make expenditures of $1,000 or more to file pre-election statements as well. *See* Ohio Revised Code § 3517.10(A), (C). A "campaign committee" is defined as a candidate or a combination of two or more persons authorized by a candidate to receive contributions and make expenditures. *See* Ohio Revised Code § 3517.01(B)(1). A "political action committee" is any combination of two or more persons, excluding a political party or campaign committee, whose primary or incidental purpose is to support or oppose a candidate, political party, or ballot issue or to influence the result of an election. *See* Ohio Revised Code § 3517.01(B)(8).

The statutory scheme in California is similar. California law requires candidates, ballot measure proponents and opponents, and political action committees to file comprehensive pre-election campaign finance statements twelve (12) days before each election, and requires disclosure within twenty-four (24) hours if "late contributions" or "late independent expenditures" are made in the final days before an election. *See* Calif. Gov't Code §§ 84200.5, 84200.7, 84200.8, 84203, 84203.5. This Court upheld similar campaign finance filing requirements for federal elections in *Buckley v. Valeo*, 424 U.S. 1, 60-84 (1976).

lish the information from the campaign finance statements in order to achieve that voter education purpose.

Reporting requirements give the public access to detailed information about contributors and expenditures of candidates and committees, including their expenditures for campaign mailings, without "[m]andating speech that a speaker would not otherwise make," *Riley*, 487 U.S. at 795. Reporting requirements are thus a readily available and more narrowly tailored means of achieving the state's goals of educating the public and protecting it from fraud and deception. *Id.* at 800; *cf. Citizens Against Rent Control v. City of Berkeley*, 454 U.S. at 298.[11] Assuming *arguendo* that identification, on the mailing itself, of the sender of a political mass mailing might be a more efficient means for Ohio to educate voters or identify those who distribute false statements, it is still beside the point. As this Court declared in striking down another portion of the North Carolina charitable solicitation law,

> . . . North Carolina may constitutionally require fundraisers to disclose certain financial information to the State, as it has since 1981. [Citation omitted.] If this is not the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency. [Citations.]

Riley, 487 U.S. at 795.

The *Riley* decision is thus fully consistent with both *Talley v. State of California, supra*, which struck down a law requiring identification in a speaker's own advocacy materials, and *Buckley v. Valeo, supra*, which upheld

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[11] In *Citizens Against Rent Control v. City of Berkeley*, this Court held that a city's $250 limit on contributions to local ballot measure committees contravened First Amendment speech and association rights, where a companion provision requiring the city to publish lists of contributors before each election obviated the risk that "voters will be in doubt as to the identity of those whose money supports or opposes a given ballot measure . . . ." 454 U.S. at 298.

campaign finance report filing requirements. Public filing requirements like those upheld in *Buckley v. Valeo* do not impose unwanted speech on a private speaker's own communications to the public. Such filing requirements are constitutional if supported by a compelling public purpose. On the other hand, statutes such as the charitable-share disclosure requirement invalidated in *Riley* or the speaker identification requirement in Ohio Revised Code § 3599.09 directly burden speech. When less burdensome alternatives exist, these forms of compelled speech cannot withstand exacting First Amendment scrutiny.

2.3 Because speaker identification requirements directly and substantially burden speech protected by the First Amendment, strict scrutiny is required.

Amicus CPAA agrees with Petitioner that the Ohio Supreme Court erred in failing to follow *Burson v. Freeman*, 112 S.Ct. 1846, 1852 (1992) and apply the test of "strict scrutiny" to the Ohio statute. The Ohio court instead relied on *Burdick v. Takushi*, 112 S.Ct. 2059 (1992) to apply the less stringent, more "flexible" standard of serving an "important regulatory interest." This Court has previously stated the applicable rule: "[W]here, as here, a prohibition is directed at speech itself, and the speech is intimately related to the process of governing, 'the State may prevail only upon showing a subordinating interest which is compelling' [citations] . . . . Even then, the State must employ means 'closely drawn to avoid unnecessary abridgment . . . .'" *First National Bank of Boston v. Bellotti*, 435 U.S. at 786, quoting *Bates v. Little Rock*, 361 U.S. 516, 524 (1960) and *Buckley v. Valeo*, 424 U.S. at 25. This Court has also said, "When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression." *Brown v. Hartlage*, 456 U.S. at 53-54.

As the above cases also emphasize, the test of "strict scrutiny" has *two* prongs: A statute must serve a compelling state interest, *and* it must be narrowly tailored to meet that interest without unnecessarily infringing on other protected rights. Neither prong is satisfied by the Ohio statute, or by other speaker identification statutes.

2.4 No sufficiently compelling state interest has been advanced to justify compelled speaker identification in political speech.

Amicus CPAA agrees with Petitioner that the Ohio court erred in finding that the state's interest "in providing the voters to whom the message is directed with a mechanism by which they may better evaluate its validity" is sufficient to justify compelled speaker identification. Petitioner correctly points out that the voters who hear an anonymous message should be entitled to evaluate all aspects of it, including its source, whether anonymous or not. Petition, pp. 15-16.

In *Talley v. State of California, supra*, this Court recognized the constructive role that anonymous advocacy has played in our nation's political history. 362 U.S. at 64-65. The value of anonymity in political speech is not just a matter of historical interest. The dissent in the Ohio Supreme Court below pointed out the potential chilling effect of prohibiting anonymity in contemporary political affairs: "I believe that the majority minimizes the effect this statute has on the ability of individual citizens to freely express their views in writing on political issues. Many ballot issues, even ones of purely local interest, are controversial." *McIntyre*, 618 N.E.2d at 156-67 (Wright, J., dissenting).

The Illinois Supreme Court has recognized that the potentially chilling effect of compelled speaker identification can actually be counterproductive to the informational

interests of the public. In *People v. White*, 506 N.E.2d 1284 (Ill. 1987), that court relied on *Talley* to hold unconstitutional a requirement for speaker identification on political literature, and explained the potentially chilling effect of prohibiting anonymity:

> By banning anonymity, the law deters many from expressing their opinions at all, resulting in an overall decrease in the flow of information to the public. Far from creating a more informed electorate, the statute extinguishes sources of information.

506 N.E.2d at 1288.

The accuracy of this observation is borne out in contemporary political experience. If anonymity were prohibited, the anonymous source known to this day only as "Deep Throat" would most likely never have given any information to reporters Woodward and Bernstein, and Watergate would be known only as a building. As the court said in *People v. White*, "much of our news concerning national affairs comes from sources which remain unidentified." 506 N.E.2d at 1288.

The Ohio statute, of course, like the speaker identification statute in California, does not prohibit anonymous leaks to the press. On the local level of politics, however, where requirements of speaker identification on printed political material have their primary impact, leaks to the press rarely generate coverage the way they do when national political figures or issues are involved. Often, the only way to effectively disseminate information on the local level, therefore, is by distributing printed material, either by hand (as Ms. McIntyre and Mr. Talley did) or by mail (which is the means of distribution regulated by the California statute). If anonymity is prohibited in such printed speech, information on the local level of the type that is routinely disseminated by "anonymous sources" through the national press will never see the light of day—and the public will be less informed.

2.5 Speaker identification statutes cannot realistically be narrowly tailored to cover only speech that may be regulated.

The Ohio court also found that Ohio's speaker identification statute "serves to identify those who engage in fraud, libel or false advertising," and that identification of such persons so they can be prosecuted under Ohio's statutes prohibiting false statements in political campaigns is a sufficiently compelling reason to justify the statute's infringement on rights protected by the First Amendment. *McIntyre*, 618 N.E.2d at 156. The proper analysis of this contention, however, is not whether the state has a compelling interest in prohibiting false statements in political campaigns, but whether the speaker identification requirement is narrowly tailored to that end.

It may be that the state may permissibly punish those who make false statements during the course of a political campaign, if the constitutional threshold of malice—knowing falsity—is met, because "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison v. State of Louisiana*, 379 U.S. 64, 76 (1964). At the same time, however, "Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." *Id.* at 74. These principles illustrate the problem with compelling speaker identification on *all* political literature for the purpose of identifying those responsible for *false* political literature: such a requirement is too broad. The requirement applies to political speech which is true, or which is opinion, and therefore entitled to the First Amendment's protection of anonymity, as well as to speech that may be false and outside of the protection of the First Amendment.

This is precisely the same problem that this Court held required invalidation of the speaker identification requirement in *Talley*:

> Counsel has urged that this ordinance is aimed at providing a way to identify those responsible for fraud, false advertising and libel. Yet the ordinance *is in no manner so limited,* nor have we been referred to any legislative history indicating such a purpose. Therefore we do not pass on the validity of an ordinance limited to prevent these or any other supposed evils. [362 U.S. at 64 (emphasis added).]

Justice Harlan, concurring in *Talley,* further described the overbreadth problem:

> Here the State says that this ordinance is aimed at the prevention of "fraud, deceit, false advertising . . ." in that it will aid in the detection of those responsible for spreading material of that character. But the ordinance is not so limited, and I think it will not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character. [362 U.S. at 66 (Harlan, J., concurring).]

The Ohio court's conclusion that the Ohio speaker identification requirement will identify those violating Ohio's prohibition against false speech in political campaigns is exactly the same argument that was made by the state in *Talley*, and rejected by this Court. The Ohio statute has the same problem as did the speaker identification ordinance invalidated in *Talley*: it is impermissibly overbroad. It must be invalidated for that reason alone.

CONCLUSION

For the reasons stated above, Ohio Revised Code § 3599.09 should be declared unconstitutional on its face.

Respectfully submitted,

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